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Discovering Rule 11 of the Mississippi Rules of Civil Procedure

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DISCOVERING RULE 11 OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE

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I. SOME BEGINNING THOUGHTS

The public perceives that we have too much litigation. That which it accepts as legitimate is seen as too expensive, too time consuming. Many would deny the label of legitimacy to much litigation that we have. And within that which is concededly justifiable, much takes place that is thought unnecessary and unreasonably expensive, resulting in excessive use of time, resources and litigation energies generally.

Varying explanations have been offered. We are a litigious society. There are too many opportunists among us, people willing to sue over nothing. There are too many hard ball playing corporations who would rather pay a lawyer's exorbitant fee than a consumer's just but more modest claim. We have too many lawyers. Their fees are too high. The system encourages building massive files before effecting settlements not that different from what might have been available much earlier and at a much lower cost.

Though the too-much-litigation phenomenon is real and has a complex variety of causes, the public passion for the moment seems focused upon the so-called frivolous lawsuit, an often misunderstood label which ought to be seen as including wholly meritless pursuit of complaints, of claims, defenses, motions and other legal papers.[1] Frivolous filings, where they have to be resisted, impose great, sometimes ruinous, costs upon parties who in fairness should not be subjected to such. These costs include not only the out-of-pocket variety but consumption of resources and energies incident to litigation and, indeed, the necessity for budgeting in anticipation of litigation either through insurance premiums, reserves or other means.

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The views expressed here are solely those of the author. Nothing said in this article should be taken as reflecting the views of any other Justice or person associated with the Supreme Court of Mississippi.

1. "Frivolous filings" is the generic label I will use in what follows to connote this recurring phenomenon, properly understood.

There is a second dimension to the problem. Our judicial resources are limited. The perception is that those limited resources are overburdened because our courts have to deal with numerous frivolous filings, thus decreasing the judicial resources available to the legitimate litigant. This perception inevitably generates political pressures for increases in the quantity of judicial resources available which in turn increases that part of the cost of justice that must be borne by society as a whole.

The major procedural mechanism available in Mississippi law for responding to the problem of the frivolous filing is Rule 11 of the Mississippi Rules of Civil Procedure.[2] Of course, courts inherently have authority to sanction the obstreperous lawyer or litigant who abuses the system.[3] That inherent authority, augmented and directed by Rule 11, would appear to afford a very great power to deal with the frivolous filing and to do so effectively. Curiously, perhaps, not all see it so.

Circumstances in recent years have combined to raise questions regarding the viability of our Rule 11. Most significant is that, while the Mississippi Rules of Civil Procedure have been generally patterned after the Federal Rules of Civil Procedure, we have not amended our Rule 11 to conform to current Federal Rule 11. All perceive that the 1983 amendments to Federal Rule 11 were intended to enlarge greatly upon the district court's power to impose sanctions to deter frivolous filings.[4] New Federal Rule 11 has had just this effect and has generated a veritable explosion of satellite litigation.[5] Anecdotes abound of federal courts imposing five- and six-figure sanctions against attorneys.[6] These results have been wrought by deletion of the pre-1983 "wilfulness" language and, as well, elimination of discretion in imposing sanctions once liability findings have been made – "may" has been changed to "shall" – augmented by a lot of tough talk from the Federal Rules Advisory Committee.[7] By way of contrast, many see Mississippi's Rule 11 as a veritable toothless tiger. Moreover, we have had relatively few occasions when sanctions have been imposed in Mississippi's trial courts under our Rule 11.[8] The so-called tort reform forces per-

2. Because the overwhelming majority of court filings (and, presumably, of frivolous filings) are made in the trial courts, our focus is there and upon Rule 11. Frivolous filings at the appellate level are subject to MISS. SUP. CT. R. 46(d). Much of what we say here applies as well to Rule 46(d), subject, of course, to the language of that rule.

3. *See infra* Part IV(F).

4. *See, e.g.*, Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1014-15 (1988); Untereiner, *A Uniform Approach to Rule 11 Sanctions*, 97 YALE L.J. 901, 903-04 (1988).

5. *See* Schwarzer, *supra* note 4, at 1013. This and many other troublesome conclusions have been drawn regarding the federal experience. I assume the correctness of such conclusions but would quickly point out that, at least insofar as I am aware, there is available at this time little reliable empirical data regarding the post-1983 federal experience.

6. *E.g.*, Unioil v. E.F. Hutton & Co., Inc., 809 F.2d 548, 559 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 85 (1987) (affirmance of Rule 11 sanctions against plaintiff's attorney for nearly $300,000).

7. *See* FED. R. CIV. P. 11 advisory committee's note (1983).

8. Not always stated but always lurking as one explanation why so few sanctions have been imposed in state courts is Mississippi's system of elected judges. A trial judge knows that every lawyer he sanctions is a potential opponent in the next election.

ceived the desirability of a legislative remedy which has in fact led to the passage of House Bill No. 772, the Litigation Accountability Act of 1988,[9] an enactment which is nothing short of a would-be amendment to Rule 11.

Reflection about these matters makes two points clear. First, the response to the problem of frivolous filings,[10] though a matter of general and legitimate public concern, is ultimately the responsibility of the judiciary of this state, not its legislature. Enactment of the Litigation Accountability Act was altogether unfortunate.[11] If a problem was perceived, it should have been attacked by application to the Rules Advisory Committee of the Supreme Court,[12] not by enactment of the legislature.

Second, present Mississippi Rule 11 vests substantial power in the trial courts to respond to the frivolous filing. True, Mississippi has not copied the 1983 amendment to Federal Rule 11. It is even quite true that Mississippi Rule 11 is a rather awkward and confusingly worded rule, although this defect is ameliorated by remembrance that independent of the rule courts have inherent authority to protect themselves from parties and attorneys who abuse the system. Still, as we hope to demonstrate below, this inherent authority aside, Rule 11 is anything but a toothless tiger. Put otherwise, the problem is not the lack of authority for state judicial response to the frivolous filing but the failure to exercise the authority which is demonstrably available. That failure, fair reflection suggests, is not due to any lack of backbone on the part of Mississippi's judiciary but to substantial uncertainty regarding the meaning and extent of the inherent power and the awkward structure and confusing wording of Rule 11. I trust that the present effort will move us toward reducing these uncertainties.

II. The Response to Frivolous Filing Is a Matter of Judicial Power

We must first face the question, whence the authority to fight the frivolous filing. To some this may seem to be reinvention of the wheel. The Litigation Accountability Act of 1988 mandates that we confront the point, for that enactment may only be seen as a challenge to the seemingly obvious proposition that

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9. *See* Miss. Laws, ch. 495 (1988) (codified as Miss. Code Ann. §§ 11-55-1 to -15 (Supp. 1988)). The Act was patterned after the Alabama Litigation Accountability Act, adopted in 1987, Ala. Code §§ 12-19-270 to -276 (Supp. 1988), and a model bill proposed by the American Tort Reform Association.

10. Like the point noted above, *supra* note 5, I am aware of no useful empirical studies regarding the nature and extent of the problem of frivolous filings in state courts. I trust all would admit this is *a major lack!*

11. I say this remembering the bitter struggle following supreme court promulgation of the Mississippi Rules of Civil Procedure back in 1981. Peace has been restored and there seems to be general acceptance of the court's inherent rule-making power by those once opposed. Why run the risk of reopening the so recently healed wounds?

12. The Advisory Committee on Rules was created by Order of the Supreme Court of Mississippi entered November 9, 1983. Its membership includes a broad cross-section of the bench and bar. The committee receives, reviews and critiques all proposals for adoption of rules or amendments of existing rules and forwards its recommendations to the supreme court.

curbing the waste of judicial and litigant resources is a judicial problem.[13]

Put positively, the case for legislative authority must rest on the notion that the frivolous filing has an adverse impact upon the public welfare and that appeals for redress should be addressed to the department of government thought charged to wield the police power. Though the legislature is the source of much law implementing the police power, nothing in the constitution places the power off limits to the executive and judiciary.

The judicious use of the legal machinery of this state is the primary concern of the department of government where that use – and any misuse – takes place: the judicial department. The authority to act upon that concern is similarly situated. That authority has become known as the rule-making power. However problematic the point may once have been,[14] the rule-making power has now been established as a permanent part of the authority of the Supreme Court of Mississippi. We are all now like the man, asked whether he believed in infant baptism, who replied, "Believe in it?! I've seen it done!" The tangible product of our baptism may be found in West Publishing's volume, MISSISSIPPI RULES OF COURT. Whether salvation or damnation is likely to emanate from that baptism is, of course, a matter about which reasonable persons might disagree.

Still, it is helpful to reflect upon whence we have come. Twenty years ago Chief Justice W. N. Ethridge, Jr., speaking for the court in *Southern Pacific Lumber Co. v. Reynolds*[15] wrote: "The phrase 'judicial power' in Section 144 of the Constitution includes the power to make rules of practice and procedure, not inconsistent with the Constitution, for the efficient disposition of judicial business."

In *Newell v. State*[16] then Justice Neville Patterson declared for a unanimous court that "[t]he inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts."[17]

The rules product of the last ten years has been quite substantial. In the last five years rule-making has proceeded at a dizzying pace.

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13. One leading Mississippi newspaper editorially endorsed the Litigation Accountability Act, and en route said: "Judges, through previous court rulings, can at present throw out frivolous actions, but this authority would be reinforced by statute." *End the farce: Curb those frivolous lawsuits*, The Clarion Ledger, April 12, 1988, at 6A. Just how this reinforcement process would work, the editorialist never explains. More to the point, why it is needed is not mentioned. If there is in Mississippi law a valid rule adequate by its terms, why does that need to "be reinforced by statute"? Implicit in the editorialist's comments is the mistaken notion that statute law is somehow better law than the other models available.

14. *See* Page, *Constitutionalism and Judicial Rulemaking: Lessons from the Crisis in Mississippi*, 3 MISS. C.L. REV. 1 (1982); Herbert, *Process, Procedure and Constitutionalism: A Response to Professor Page*, 3 MISS. C.L. REV. 45 (1982); Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform*, 43 MISS. L. J. 287 (1972).

15. 206 So. 2d 334, 335 (Miss. 1968).

16. 308 So. 2d 71, 76 (Miss. 1975).

17. *See also* Scott v. State, 310 So. 2d 703 (Miss. 1975); Haralson v. State, 308 So. 2d 222 (Miss. 1975).

Best known, because they receive the widest public discussion and have been the topic of many legal seminars, are the three sets of rules largely patterned after comparable federal rules: the Mississippi Rules of Civil Procedure, the Mississippi Rules of Evidence, and now the Mississippi Supreme Court Rules. Lesser known but quite significant and equally a product of the supreme court's rule-making power are the Uniform Circuit Court Rules, the Uniform Criminal Rules of Circuit Court Practice, the Uniform Chancery Court Rules, the Uniform County Court Rules and the Uniform Criminal Rules of County Court Practice.

Nevertheless, every winter, people who know better beseech the Mississippi legislature to enact upon subjects well within the judicial power. The Litigation Accountability Act of 1988 is only one instance in which the legislature succumbed and enacted upon a subject quite arguably beyond its legislative authority.[18]

Something of a bootstraps response should suffice. The Mississippi Rules of Civil Procedure contain a rule by its terms addressing the problem of the frivolous filing. That rule is Rule 11. Along with all other provisions of the rules, the Supreme Court of Mississippi has declared authoritatively that Rule 11 lies within the court's rule-making power.[19] The primary rule obligating parties and lawyers to refrain from frivolous filings, whether found in Rule 11 or the court's inherent authority, is thus seen as valid:[20] valid in the sense that other parties may of right call upon courts to enforce the rule and in the further sense that the judges of such courts are on their oaths obligated to grant – where well founded – such claims of right.

Our few cases construing Rule 11 assume, albeit *sub silentio*, that the rule is valid.[21] After all, it is a rule regulating practice and procedure in civil actions brought in the courts of this state. As such, it is a rule within the competence of the supreme court to enact.[22] Judicial authority is not ousted by the fact that the frivolous filing is seen as a public nuisance subject to the police power. Not just the legislature but the entire state is vested with police powers

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18. Other examples include the Child Abuse Evidence Act, *see* MISS. CODE ANN. §§ 13-1-403 to -415 (Supp. 1987); Hosford v. State, 525 So. 2d 789, 790 n.1 (Miss. 1988); and the Mississippi Uniform Post-Conviction Collateral Relief Act, MISS. CODE ANN. §§ 99-39-1 to -29 (Supp. 1987); Reynolds v. State, 521 So. 2d 914, 915 (Miss. 1988). The latter Act begins with a blatant declaration of purpose, declaring that it "supersedes Rule 8.07 of the Mississippi Uniform Criminal Rules of Circuit Court Practice." MISS. CODE ANN. § 99-39-3(1) (Supp. 1987). One would-be justification of such legislative efforts merits note. The question is put:"How else may the legislature communicate its concerns to the Court?" I answer, if formality is desired and appropriate, pass a resolution; if informality will suffice, pick up the telephone.

19. *See* Order Adopting The Mississippi Rules of Civil Procedure, entered May 26, 1981, *reprinted in* MISSISSIPPI RULES OF COURT 217 (1988).

20. I refer to – and accept – the concept of legal validity articulated in H.L.A. HART, THE CONCEPT OF LAW 97-107 (1961).

21. Dethlefs v. Beau Maison Dev. Corp., 511 So. 2d 112, 118 (Miss. 1987).

22. By way of analogy, consider Hanna v. Plumer, 380 U.S. 460 (1965); Affholder, Inc. v. Southern Rock, Inc., 746 F.2d 305, 307-09 (5th Cir. 1984).

within the sphere otherwise constitutionally defined for them. That being so, the judiciary is not bound by legislative enactments within the core of the judicial power.[23]

This is not to say that the judiciary should give the back of its hand to every legislative enactment arguably encroaching upon its rule-making turf.[24] Deference ought to be given such legislative expressions, not out of accession to authority, but in respect for the legislature as that branch of government closest to the people whom all branches have been created to serve. For when all is said and done, law is not an end, but a means to the end, of a society in which we should all want to live; and legislatures are one structure democratic theory has devised for identifying the shape of that popularly desired society. While the Litigation Accountability Act of 1988 was well beyond legislative competence, our courts should regard the Act's provisions as aids to interpretation of Rule 11 and, indeed, to judicial supplementation of that rule, to the extent this may be done without violence to the integrity of Rule 11, the principles embedded in it and the purposes it serves.[25]

III.

A. The Rule Itself

Rule 11 of the Mississippi Rules of Civil Procedure reads as follows:

> RULE 11. SIGNING OF PLEADINGS AND MOTIONS
>
> (a) Signature Required. Every pleading or motion of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented

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23. *Cf.* Dye v. State *ex rel.* Hale, 507 So. 2d 332, 343 (Miss. 1987); Alexander v. State *ex rel.* Allain, 441 So. 2d 1329, 1345-46 (Miss. 1983).

24. For one thing, a case may be made that the quality of draftsmanship exhibited by the Litigation Accountability Act is somewhat superior to that of Mississippi Rule 11. I say this notwithstanding that there are several structural flaws in the Act, note of which will be taken later.

25. Our law stands in great need of the development of a general analytical framework that will guide judicial response to legislative enactments in the field of practice and procedure. That our courts are not obligated to enforce such statutes seems clear enough, but the problem is not so simple. I regard the comity considerations noted above as powerful as they are legitimate. Where a court-made rule of procedure collides with a longstanding public policy pronouncement of legitimate legislative concern, we often ought to exercise our authority in respect for the legislative declaration. City of Mound Bayou v. Roy Collins Constr. Co., 457 So. 2d 337, 340-43 (Miss. 1984). Beyond cases of actual conflict between rule and statute (in part the case we have here) and beyond those statutes mentioned *supra* note 18 – which lists only the recent and the prominent – our law includes many other statutes regulating matters of practice and procedure in our trial courts, matters not within the coverage of any rule of procedure. Consider, for example, our statute regarding motions for continuances. MISS. CODE ANN. § 11-7-123 (1972). *See also* MISS. UNIF. CIR. CT. R. 2.12. There seems little likelihood that all such statutory rules of procedure will be reproduced in "rule" form and incorporated into either the Mississippi Rules of Civil Procedure or the Mississippi Uniform Circuit or Chancery Court Rules at any point in the foreseeable future. We have treated such statutes as though they "governed," that is, the statutes were allowed to furnish the rule of decision on the point of procedure at issue. But this has been a treatment by default.

The point could be expanded. I doubt any would argue that we need to work out a coherent plan for judicial response to such situations. The development of such an analytical framework, though arguably precedent to the present effort, must await another day.

by an attorney shall sign his pleading or motion and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading or motion; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.

(b) Sanctions. If a pleading or motion is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading or motion had not been served. For wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees.

The rule is, with one significant exception, a near verbatim reproduction of the pre-1983 version of FED. R. CIV. P. 11.[26] Former Federal Rule 11 covered pleadings only. Mississippi Rule 11 applies to motions as well.[27] More important, the last sentence of what is codified as Mississippi Rule 11(b) – that authorizing assessment of fees and costs for frivolous filings – is nowhere to be found in former Federal Rule 11.

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26. Former Federal Rule 11 reads:

Rule 11. Signing of Pleadings

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Federal court constructions of so much of this rule as is identical in wording to the Mississippi rule should be regarded as aids to interpretation. *See* Guaranty Nat'l Ins. Co. v. Pittman, 501 So. 2d 377, 381-82 n.2 (Miss. 1987); Brown v. Credit Center, Inc., 444 So. 2d 358, 364 n.1 (Miss. 1983).

27. Curiously, the Litigation Accountability Act of 1988 extends its coverage only to "actions" and by its silence excludes motions. MISS. CODE ANN. § 11-55-3(c) (Supp. 1988).

B. Interpretation of Rule 11

Our search for the meaning of Rule 11 begins with its language.[28] Much of that language is general and open-textured. Its structure is awkward, if not inconsistent.[29] For one thing, it is not at all clear that any of the expressed liability standards in Rule 11(a) have sanction counterparts in Rule 11(b). Careful reading of Rule 11(b), labeled "Sanctions," reveals as well a number of liability standards. It is not too farfetched to suggest that the last sentence of Rule 11(b) renders the rest of the rule superfluous. Nevertheless, Rule 11's text is and must be our ultimate referent where questions of meaning are presented, for fidelity to law demands nothing less than that any interpretation of a legal text first and foremost fit *that* text rather than some other text we may wish had been enacted.[30]

The task of interpreting any rule of law is aided considerably where the court may identify a coherent purpose sought to be accomplished by the rule.[31] Yet no notion should be resisted more strongly than that which seems so intuitively to come to the lawyer's mind: that we should seek the intent of the lawmaker, in this instance the rule's draftsman. To be sure, laws do not come into being without the lawmaker(s) having some purpose in mind. But we should not – and cannot – seek legal purpose by unpacking the thought process of the draftsman.[32] Legal purpose is sought in "the objective accessible world,"[33] which always begins with the language of the law. Indeed, that language is the only place we may mine legitimately for draftsman's intent.[34]

All understand generally that Rule 11 has been made a part of our Rules of Civil Procedure to empower the court to deal with the problem of the frivolous

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28. For a summary of our interpretive process from another context, *see* Whitten & Robertson, *Post-Custody, Pre-Indictment Problems Of Fundamental Fairness and Access To Counsel: Mississippi's Opportunity*, 13 VT. L. REV. 247, 272-75 (1988).

29. At various points I am highly critical of the wording of Mississippi Rule 11. In fairness to the Mississippi Advisory Committee (not to be confused with the present Advisory Committee, *see supra* note 12) which drafted the rule, I emphasize – and perhaps repetitiously – that the ultimate culprits by and large were federal draftsmen. *See supra* note 26 and accompanying text. Since one of the principal purposes of adopting the Mississippi rules was to make uniform the rules of practice and procedure in civil cases in all trial courts, federal and state, the advisory committee adhered to the federal wording except where there was a substantial reason suggesting otherwise. Ordinarily I regard that as a commendable policy. Here, perhaps, with benefit of twenty-twenty hindsight, the committee's adherence to federal terminology may be a bit slavish.

30. In what I say here I have much in mind Ronald Dworkin's integrity view of law as expressed in his LAW'S EMPIRE (1986). Unlike Dworkin, however, I do not exclude the positivists' notion of legal validity nor the realists' pragmatic instrumentalism, for each in my view is a quite legitimate albeit subordinate judicial resource in deciding hard cases.

31. Per Holmes: "[A] body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." Holmes, *The Path Of The Law*, 10 HARV. L. REV. 457, 469 (1897).

32. In this instance, who would that draftsman be? The Mississippi Advisory Committee? The (unknown to us) federal draftsman whose language we copied? The Supreme Court of Mississippi, which promulgated the rules – and likely never read this particular rule?

33. *Cf.* Thornhill v. System Fuels, Inc., 523 So. 2d 983, 1007 (Miss. 1988) (Robertson, J., concurring in denial of petition for rehearing).

34. *Cf.* UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc., 525 So. 2d 746, 754 (Miss. 1987).

filing. A reading of the rule suggests that the draftsman thought there wasn't much doubt of the rule's purpose, for, although at no point in the rule is any particular purpose stated, the first sentence of subsection (b) authorizes the sanction of the striking of a motion or pleading if it "is signed with intent to defeat the *purpose* of this rule."

In many instances the purpose of a rule of procedure may be gleaned from the official comment. The Comment to Rule 11[35] – which is in all respects superficially written – provides: "The purposes of Rule 11 are to require that all pleadings, motions, and papers in an action be signed . . . and to eliminate the requirements of verified pleadings." No help is given there. In the second paragraph of the Comment we find the sentence, "Good faith and professional responsibility are the bases of Rule 11." Again, we find no aid to interpretation.

Given the text of Rule 11, the question we ought to ask is, what purpose could best justify the promulgation of *this* rule? We seek no historical fact. We do not inquire what the draftsman meant. We ask what the rule means.[36] We seek the best statement of purpose which may justify the rule today,[37] given the world we live in.

That best statement may be far from perfect and will always fall short where our text is as deficient as that before us today. For, as I have written elsewhere:

> [R]ules of law being made by man are incapable of perfection. Because of our relative ignorance of fact and the relative indeterminacy of aim, we make rules which include that we should wish excluded and which exclude that we should prefer included. The judicial process should not be confused

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35. The entire comment reads:

> Comment
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> The purposes of Rule 11 are to require that all pleadings, motions, and papers in an action be signed by at least one attorney of record and to eliminate the requirements of verified pleadings. Only the original paper must be signed, although copies served on the adverse attorneys should indicate by whom the original was signed. Counsel's office address should appear on all pleadings and other papers. This procedure accords with Miss. Code Ann. §§ 11-5-9 and 11-7-91 (1972).
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> Good faith and professional responsibility are the bases of Rule 11. Rule 8(b), for instance, authorizes the use of a general denial "subject to the obligations set forth in Rule 11," meaning only when counsel can in good faith fairly deny all the averments in the adverse pleadings should he do so. Also, a signed pleading may be introduced into evidence in another action by an adverse party as proof of the facts alleged therein.
>
> Verification will be the exception and not the rule to pleading in Mississippi; this is a break from past practice. *See* Miss. Code Ann. §§ 11-5-21; 11-5-29; 11-5-31; and 11-5-33 (1972). No pleading need be verified or accompanied by affidavit unless there is a specific provision to that effect in rule or statute. *See* Rules 27(a) and 65.
>
> Sham pleadings and willful violations are disciplined consistently with past Mississippi procedure. *See Sherrill v. Stewart*, 197 Miss. 880, 21 So. 2d 11 (1945).
>
> The final sentence of Rule 11(b) is intended to ensure that the trial court has sufficient power to deal forcefully and effectively with attorneys who may intentionally misuse the liberal, notice pleadings system effectuated by these rules.

MISS. R. CIV. P. 11 comment.

36. O. HOLMES, COLLECTED LEGAL PAPERS 207 (1920).

37. *See* Mississippi Ins. Guar. Ass'n v. Vaughn, 529 So. 2d 540, 542 (Miss. 1988).

> with Newton's thermodynamics or Einstein's gravity (although quantum mechanics does present an attractive physical analogue).[38]

There is no irrefutable proof we may offer that one purpose ought to be attributed to Rule 11, vanquishing all others. What is certain is that failure of consensus regarding a dominant purpose will lead to that most unfortunate of experiences within a legal system: varying and inconsistent interpretations and applications of law.

These considerations lead me to avoid one type of policy statement, intuitively attractive and plentiful in the literature. I refer to that which at once extols the benefits of lawyer tenacity and virtuosity *and* the importance of nailing the frivolous filer.[39] The problem with such policy statements is that they in fact announce two policies not at all consistent with each other. The trial judge is left trapped between the tension of such conflicting policies, with the apparent consequence quite inevitable: varying and inconsistent actions from judge to judge, from county to county, and from case to case.

We must settle on a single purpose. Viewed in this light, at least three purposes for the rule suggest themselves: (1) punishment of attorneys and parties who make frivolous filings; (2) compensation of victims of frivolous filings; that is, making whole litigants who have suffered losses as a result of frivolous filings by their adversaries; and (3) deterrence of frivolous filings. The superficial reaction is likely to be that Rule 11 serves each of these purposes and that courts ought to interpret the rule in light of each. The superficial reaction leads to trouble, for as anyone who has seriously thought about the law of crimes or torts well knows, there are major tensions and inconsistencies between and among these three purposes, and determination of which has primacy has a great effect upon the choice of judicial action in particular cases.[40] The problem becomes acute when we realize that the rule will be given inconsistent interpretations from court to court and, indeed, from day to day, unless consensus is

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38. Jones v. State, 517 So. 2d 1295, 1314 (Miss. 1987) (Robertson, J., dissenting) (citations omitted).

39. One of the better policy statements of this genre is found in Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985), where the Court of Appeals said:

> [W]e do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself. Courts must strive to avoid the wisdom of hindsight in determining whether a pleading was valid when signed, and any and all doubts must be resolved in favor of the signer. But where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated.

762 F.2d at 254.

40. The frivolous filings problem is one that needs extensive empirical research. That research is needed now, to identify the nature and extent of the problem. It will be needed in the future to measure Rule 11's effectiveness and effects. Any approach to interpretation that extols multiple and inconsistent purposes will render nightmarish the researchers' efforts – and impeach the validity of their findings.

reached regarding Rule 11's dominant purpose.[41] In the case of Federal Rule 11, there appears to be a general consensus that deterrence of frivolous filings is the rule's primary goal.[42]

My reading of Mississippi Rule 11 suggests that general deterrence of frivolous filings is the policy that could best justify the promulgation of that rule today. En route to judicial interpretation and application, the purpose which ought to be attributed to Rule 11 is that of holding to a minimum the costs of frivolous filings.[43] By "costs" I include the cost to opposing litigants who are the victims of frivolous filings and, as well, the costs experienced by the judicial system within which cases are litigated and by the public which ultimately pays much of the bill. But Rule 11 is not a cost-shifting rule. Our concern is the social cost of frivolous filings, not the private cost.[44]

The point may be put another way. Compensation and punishment theories give the frivolous filer a choice and impliedly adopt an attitude of indifference to how the choice is exercised. Compensation theory says to the frivolous filer that the law does not care if he signs, files, serves and pursues a frivolous point so long as he is willing to pay expenses incurred by the opposition. Deep pocket, hard ball litigants may in many instances calculate that the cost is worth it. And the same of punishment theory.

Rule 11 sets standards of conduct. Compliance should not be seen as optional. We should not be indifferent to whether parties adhere to those standards.[45] A deterrent purpose ought to be attributed to Rule 11, for rational reflection reveals that, if pursued with sensitivity and resolve, a deterrent purpose is more likely in fact to minimize the cost of frivolous filings than either of the others.[46]

Of course, whatever a court does – knowingly or unintentionally, correctly or mistakenly – will send some signal. The combined judicial stewardship (or non-stewardship) of Mississippi's Rule 11 *will* generate incentives that *will* affect the behavior of would-be frivolous filers, for better or for worse. So seen, why would we not seek to administer Rule 11 so that we hold the cost of frivolous filings to a level of optimal efficiency? If efficiency so defined is the goal of Rule 11, then interpretation necessarily must proceed upon a forward looking utilitarianism. Punishment of offenders may be a necessary by-product, but that

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41. Varying and inconsistent interpretations have been one major area of concern identified in the early experience with the new Federal Rule 11. *See* Schwarzer, *supra* note 4, at 1015-17; Untereiner, *supra* note 4, at 909-12.

42. *See, e.g.*, Schwarzer, *supra* note 4, at 1020; Untereiner, *supra* note 4, at 907-09.

43. A reading of the Litigation Accountability Act of 1988 reinforces the rejection of compensation of victims as a goal. Section 4 of that Act lists eleven factors to be considered in fixing the amount of sanctions. The amount of attorneys' fees and legal expenses experienced by the victim is *not* among those factors.

44. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 7 (3d ed. 1986) ("A social cost diminishes the wealth of society; a private cost merely rearranges that wealth."); Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

45. *See* Cuevas v. Royal D'Iberville Hotel, 498 So. 2d 346, 356-57 (Miss. 1986) (Robertson, J., dissenting).

46. The deterrent purpose of Rule 11 was recognized in Canton Farm Equip., Inc. v. Richardson, 501 So. 2d 1098, 1108 (Miss. 1987).

punishment should be inflicted in the form of Rule 11 sanctions only where – and to the extent that – such may be reasonably likely to reduce the cost of frivolous filings in the future. By the same token, compensation to frivolous filing victims will be the necessary by-product of enforcement, but compensation should not be ordered for the purpose of making those victims whole, but only where and to the extent necessary to deter frivolous filings in the future.

Put simply, interpretations of Rule 11 should not look to the past but to the future. Courts enforcing Rule 11 should not concern themselves with punishing frivolous filers nor compensating their victims, but should direct their search for such sanctions as are allowed by the rule and as may be reasonably likely through the message sent to the bar and litigants to hold to a minimum the social cost of frivolous filings.[47] We should make no attempt to put Humpty Dumpty back together again, but to minimize the risk of another great fall in the days ahead.

But there are two types of deterrence: general deterrence and specific deterrence. A policy of general deterrence contemplates incentives to all would-be frivolous filers (including the culprit for the day). Specific deterrence limits its focus to the particular lawyer or party found to have offended Rule 11. The best justification for Rule 11 is a policy of general deterrence. A policy of specific deterrence would diminish our ability to reach the goal: to hold to an optimal level the social cost of frivolous filings. It is a fly-swatter approach to a cloud of locusts.[48] This is not to say that swatting a particularly worrisome fly does not specifically deter that fly from future worrisome behavior and, as well, provide less tangible personal satisfactions. One-by-one specific deterrence fails by the standard of efficiency, given general perceptions of the extent of the frivolous filings problem.[49]

Three important caveats need be added. First, there is a sense – in no way inconsistent with what has just been said – in which interpretation always mandates a backward glance. Our courts may not take *any* action that might deter future frivolous filers, but only those actions that are authorized by the language of Rule 11 as promulgated on May 26, 1981. Moreover, each interpretation requires fidelity as well to the principles embedded in the precedents.[50] These are meager at the moment. That will change in time.

Second, Rule 11 is not the only rule in the Mississippi Rules of Civil Proce-

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47. This is not to suggest that it is either likely (or desirable – or possible!) that other considerations may be excluded from specific Rule 11 decisions, for I have no desire to resurrect the era of mechanical jurisprudence. To take the extreme case, I am not quite ready to sacrifice a solo practitioner's life savings on the altar of general deterrence.

48. That we know not how many make a cloud in this or other contexts hardly invalidates the point. *Cf.* MISS. UNIF. CHAN. CT. R. 3.06.

49. Again, a plea for empirical research is in order, to the end that the future frivolous filings debate may be a bit more sensible than that we have seen in the recent past.

50. I refer to the Dworkinian method of reading the precedents. *See* R. DWORKIN, *supra* note 30, at 225-50.

dure. What we have said up to this point regarding the purpose of the rule contemplated that it be considered in a vacuum. As all know, Rule 11 must be construed consistently with other rules of the Mississippi Rules of Civil Procedure.[51] Here it is important to note the general purposes of the entire body of rules and the injunction of Rule One that: "These rules shall be construed to secure the just, speedy and inexpensive determination of every action." The deterrent approach to Rule 11 we have just discussed is quite consistent with the Rule One purposes of securing the speedy and inexpensive determination of every action. A bit of reflection suggests, however, that it may be inconsistent with the foremost purpose of the rules as announced in Rule One, securing the just determination of every action. This fundamental point requires reflection beyond what we may give it here.

Finally, Rule 11 is not primarily a docket control rule. Case management is only tangentially among its purposes. Rule 11 is not designed to deter numerous filings or even the burdensome filing, but only the frivolous. To be sure, pursuit of the frivolous filing does consume judicial time and energy that could be devoted to more legitimate litigation. In that limited sense, deterrence of frivolous filings aids the court's time management. But the problems of crowded dockets and not enough time to dispense quality individualized justice in the way we should like have substantial roots not causally related to the problem of frivolous filings. The ax and shovel we need to uproot *those* roots may not be found in Rule 11 or any other litigation accountability rule. Any court that imposes a sanction upon a marginally frivolous filing, in whole or in part, to assert control over the court's docket or to make a burgeoning caseload more manageable, likely acts without authority in the spirit, purpose or language of Mississippi Rule 11.

IV. Across the Board Questions

A. The Matter of Rule 11 Coverage

Our initial question is one of coverage. What "filings" made by a party or an attorney are subject to scrutiny under Rule 11? We answer this and the questions that follow by resort to the interpretative process just sketched and ultimately by reference to the language of the rule.

The first two sentences of Rule 11(a) impose a signing requirement. Referring to the case in which a party is represented by an attorney, the first sentence requires the attorney's signature on "every pleading or motion." The signing requirement in the second sentence of Rule 11(a) regulates pro se litigants and again refers to "his pleading or motion." The important certificate requirement

51. Note Miss. R. Civ. P. 8, regarded as one of the most liberal of our rules, that which fosters a regime of notice pleading, *see* Stanton & Assocs., Inc. v. Bryant Constr. Co., Inc., 464 So. 2d 499, 505 (Miss. 1985), which provides expressly that it is "subject to the obligations set forth in Rule 11." *See* Miss. R. Civ. P. 8(e)(2).

of Rule 11(a) provides that the signature of the attorney constitutes a certificate by him that he has "read the pleading or motion." The subsequent "good grounds" requirement and "not interposed for delay" requirement are related to the pronoun "it" which surely refers back to "pleading or motion."

Rule 11(a) is hardly a model of apt draftsmanship. Still there are few interpretive problems on the question of coverage: the rule extends to "pleadings and motions."

Rule 11(b) – which is even more confusingly worded than Rule 11(a) – begins with a reference to "a pleading or motion" which may be stricken if signed with intent to defeat the purpose of the rule. The all-important frivolous filing provision of the last sentence of Rule 11(b) refers to "a motion or pleading," reversing the nouns without apparent reason or effect. All of this language would seem to suggest Rule 11 coverage only of papers filed with the court that fall within the generic categories of pleadings and motions.

The first sentence of the comment, however, suggests a broadened application of the rule to "all pleadings, motions *and papers*."[52] The comment then refers to "the original paper" and subsequently to "all pleadings and other papers." The question raised, of course, is whether the rule would apply to "papers"[53] such as interrogatories, requests for production and other discovery filings. What about requests for jury instructions? Affidavits in support of motions? Briefs? Can the comment expand coverage beyond what may be found in the rule?

What are "pleadings" presents no special problem. Pleadings are defined by MISS. R. CIV. P. 7(a), and certainly include the matters denominated there, plus those substantively within Rules 8 and 9. Amendments contemplated by Rule 15 are pleadings within Rule 11. A "motion" is by definition "an application to the court for an order."[54] It seems safe enough to say that any other paper filed (including a letter), asking the court to do or order something done, should constitute a "motion" within Rule 11, whether the particular paper be denominated formally as a motion, petition, request or perhaps not named at all.

Our larger concern is whether the rule covers all papers within the Rule 11 problem. Are there "other papers" which if frivolously filed might have the effect of unfairly hindering or delaying a party's cause, effecting harassment, or

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52. MISS. R. CIV. P. 11 comment (emphasis added). This language is likened to that found in the 1983 amendment to Federal Rule 11 which applies to "the pleading, motion or other paper." *Cf.* MISS. SUP. CT. R. 46(d), which authorizes appropriate disciplinary action against any attorney "for filing any frivolous petition, motion, brief or other paper."

53. The Litigation Accountability Act of 1988 is quite confusing on this point. It appears to eschew coverage of "other papers" but lists discovery abuses among its targets. MISS. CODE ANN. § 11-55-5(1) (Supp. 1988). The general coverage target is "action . . . claim or defense." MISS. CODE ANN. § 11-55-5(1) (Supp. 1988). In defining the key concept "[w]ithout substantial justification," however, the Act includes "any motion." MISS. CODE ANN. § 11-55-3(a) (Supp. 1988). In this state of affairs the coverage language of § 11-55-5(1) ought to control, though the point is not without doubt. To the extent that the Act excludes coverage of motions, there is a conflict between that Act and Rule 11. I trust it is clear to all that the judiciary ought to follow Rule 11 and ignore any such restriction in coverage emanating from the legislative enactment.

54. *See* MISS. R. CIV. P. 7(b)(1).

inflicting unnecessary expense? The answer is, perhaps so, but this would seem largely academic, though not wholly a matter of unconcern. The matter of abusive discovery filings is not likely to be troublesome as it is subject to the sanctions of Rule 37 and, hence, there is arguably no need for Rule 11 coverage.[55] There is no need to decide whether the frivolous or harassing brief filed in support of the motion for summary judgment is within Rule 11 coverage, for the motion itself surely is. The motion under Rule 56(f) filed solely to delay the inevitable is within Rule 11 coverage. But what of the similarly motivated brief in opposition to summary judgment? Keep in mind the court's inherent power to sanction those who substantially abuse the judicial process.[56]

The sort of papers that come most quickly to mind as those whose pursuit is likely to cause the effects Rule 11 is designed to deter all fit easily either within the generic "pleadings" or "motions," or are appendages of such. Though the official comments are generally to be taken as serious interpretations of the rules, there is here cause for pause as the comment appears to enlarge upon the language of the rule with respect to the point of coverage.[57] Whatever gaps may appear in the comment, an amendment to the rule, to add "and other papers" would not seem undesirable. Still, the court's inherent authority to sanction those who abuse the judicial process should be sufficient unto the day.

B. Rule 11's Liability Trigger

There is another question of coverage of greater practical importance: what action (or inaction) with respect to a "pleading or motion" activates judicial authority to inflict Rule 11 sanctions? The only verb we find in Rule 11(a) is "sign," stated in various tenses. The important last sentence of Rule 11(a) refers to the "signature" of the attorney as constituting his certificate. Rule 11(b) again employs the verb "sign" qualifying that with such phrases as "with intent" and "wilful." The last word of the first sentence in Rule 11(b) introduces a new verb, "served," the reference obviously being to service of a pleading or motion within Rule 5. Yet another concept appears in the third sentence regarding scandalous and indecent matter where the verb is "is inserted," referring to the drafting

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55. What of the case where counsel is assigned a file, finds in it the names of twenty witnesses, and whips out twenty deposition notices although competent and prudent counsel would depose only three? *Cf.* FED. R. CIV. P. 26(g).

56. *See infra* Part IV(F).

57. The status of the Comments to the Mississippi Rules of Civil Procedure has not been clearly established. Those comments are from time to time referred to as "official comments." Pope v. Schroeder, 512 So. 2d 905, 908 (Miss. 1987); *Stanton & Assocs., Inc. v. Bryant Constr. Co., Inc.*, 464 So. 2d 499, 505 n.6 (Miss. 1985). The court has referred to those comments as "helpful," Brown v. Credit Center, Inc., 444 So. 2d 358, 362 (Miss. 1983) and even as "normally our most valued guide to proper construction," Guaranty Nat'l Ins. Co. v. Pittman, 501 So. 2d 377, 381 (Miss. 1987). Still, on at least one occasion the court found a comment mistaken. *See* First Miss. Nat'l Bank v. KLH Indus., Inc., 457 So. 2d 1333, 1336-37 (Miss. 1984).

of the motion or pleading. Not until we reach the last sentence of Rule 11(b) do we find the verb "file."

Thus read, Rule 11 is again seen as a product of quite sloppy draftsmanship. As easily drawn as this conclusion may be, we remain saddled with the task of identifying the action(s) or inaction(s) which activates the sanction power. Is it signing the motion or pleading? Surely not that alone, for a motion or pleading which is signed but never filed or served cannot possibly inflict costs on either an adverse party to the litigation or upon the court. Similarly, mere insertion into a motion or pleading of "scandalous or indecent matter" may not rationally be the object of sanctions if the pleading or motion is never filed or served. "Service" may cause harm to a party, although a fair reading of the rule does not support choice of this verb as that which triggers the Rule 11 sanction. Accepting our responsibility to give the rule a reading which fits its words but is also that reading which is most coherent, we must place emphasis on the verb "file." Rule 11 sanctions, according to the rule, may be imposed upon the filing of a motion or pleading. More technically correct would be a requirement of "filing and . . . ," that is, filing and signing, filing and serving, filing and inserting "scandalous or indecent matter."

This gives rise to yet another problem. The *mere* signing, filing and serving of a frivolous pleading does not necessarily in fact impose more than *de minimis* costs upon the opposing party or the court. Consider two familiar examples. The plaintiff demands damages substantially in excess of any sum he reasonably expects to be able to recover. The defendant makes the boilerplate assertion in his answer that the complaint fails to state a claim upon which relief may be granted. If the frivolous part of these filings is not pursued, there is no harm, though there may well be a technical violation of Rule 11.[58] Thought upon this leads to the further thought that the harm, the expense and delay to opposing litigants, the expense and consumption of time of the court, are caused by pursuit, when the frivolous filing is signed, filed, served *and pursued.*

In construing the "good ground" requirement of the certificate provision of Rule 11(a) or the "frivolous" filing provision of Rule 11(b), many have suggested that a party and his attorney ought to be saddled with a duty of continuing inquiry. The notion is that there should come a time when a party and his attorney have had enough time to investigate the case and obtain discovery so as to know whether there are good grounds to support an allegation or whether they are frivolous, and the same of legal theories. While the sanction may not be properly imposed upon the mere filing of the motion or pleading, it certain-

58. *See* Dethlefs v. Beau Maison Dev. Corp., 511 So. 2d 112, 118 (Miss. 1987) (plaintiff asserted "colorable, justiciable claim" but "exaggerated" it; $3,000 attorneys' fees award made under Rule 11 reversed because defendant "was put to no additional expense" by plaintiff's having "exaggerat[ed] . . . her claim.").

ly ought to be imposed if after a reasonable time it is not withdrawn,[59] or so the argument goes.

The more sensible approach would be to provide that the sanction power be deemed activated only when a party has pursued his frivolous filing to the point where it has in fact imposed costs and delay upon another party or upon the court. This sensible approach, perhaps unfortunately, is not among our options. One reason for this is that we find within Mississippi Rule 11 no duty of diligent inquiry, much less a continuing duty. However attractive the "continuing duty" thesis may be, our question is whether it may be found within the language of the rule, for our reading must not only be consistent with the purposes of the rule, the best justification that may be given the rule, but also it must fit the language of the rule. Faithful reflection reveals that "continuing duty of inquiry" just is not there.

Similarly, candor requires concession that the language must be strained to make Rule 11 read that its liability requirement is satisfied only when a party pursues a frivolously filed pleading or motion. A *filing plus* interpretation is mandated by the requirement of fit. As a practical matter, however, proper stewardship of the rule in the trial courts likely will produce results consistent with the notion of emphasis upon pursuit. Because the quantum of sanctions is likely to be affected by the extent of harm caused in spite of our plea that deterrence, not compensation, be our guide to interpretation, the court is likely to have few occasions to impose sanctions for frivolous filings which have caused no harm. This is so if for no other reason than that lawyers are not likely to file Rule 11 motions when there is nothing to be recovered except a *de minimis* sanction.

There is a more troublesome question that needs to be considered. I refer again to the pleading or motion which is without good grounds and is frivolous but which is not pursued by the filing party and, rather, is simply allowed to lie in the court file. What is the result if the opposing party expends substantial time in preparing to resist the frivolous position, when and if it is pursued, and at some point late in or near the end of the litigation that party files a Rule 11 motion, only to be met with the response of "True, my defense of 'failure to state a claim' was one I never had any reasonable basis for believing would succeed, but I never pursued the point, never filed a motion for summary judgment on that ground, and never did anything to lead you to believe that I took it seriously and, therefore, all this work you did in researching the history and viability of a claim under Mississippi law under Section 402A of RESTATEMENT (SECOND) OF TORTS was a waste of time, time and effort needlessly spent, for

59. *See*, for example, the federal cases of Woodfork v. Gavin, 1 Fed. R. Serv. 3d 209 (N.D. Miss. 1985); Touchstone v. G.B.Q. Corp., 1 Fed. R. Serv. 3d 398, 402 (E.D. La. 1984) discussed in G. COCHRAN, SANCTIONS UNDER RULE 11 214-15 (1985). *See generally* Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 207-13 (1988).

which you have no right to sanction me under Rule 11"? Surely the question here becomes one of the reasonableness of the conduct of the party moving for sanctions. We should be loathe to allow an interpretation of Rule 11 which would encourage parties to take advantage of technical violations of the rule. A party against whom a pleading or motion is filed, even where he may reasonably believe that pleading or motion is frivolous, ought to be held to an obligation to mitigate his damages.[60]

C. The Idea of the Frivolous

Fundamental to our efforts this day is definition of the concept of the frivolous. Assuming an imperative for consistent interpretation from county to county and from case to case, we must elucidate "frivolous" both as a word and as a concept. We must generate standards susceptible of evenhanded application in the hands of sensitive trial judges.

But legal frivolousness is an elusive concept.[61] Presumably it includes the point a party asserts with absolutely no chance of success. It certainly does not include the "colorable, justiciable claim" which is asserted vigorously but ultimately without success.[62] We trust that no one would suggest that every litigant who suffers a directed verdict or summary judgment should be held to have made a frivolous filing subject to Rule 11 sanctions. Not every claim or defense dismissed or stricken as a matter of law, under MISS. R. CIV. P. 12(b)(6) or otherwise, is legally frivolous.[63] The party and attorney who bring a suit or assert a defense in defiance of existing precedent may well, as a practical matter, have little hope of success. Yet I regard it as highly undesirable that such parties be subject to Rule 11 sanctions.[64]

A brief review of recent Mississippi legal history should make the point. Should the plaintiff and attorney, who before *Burns v. Burns*[65] challenged interspousal tort immunity, have been hit with Rule 11 sanctions? Should the plaintiff and

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60. Compare the approach taken under new Federal Rule 11. Untereiner, *supra* note 4, at 918.

61. U.S. District Judge William W. Schwarzer has suggested that any attempt to define frivolousness so that one could "predict with some certainty whether a claim is . . . beyond the pale . . . would be disingenuous." Schwarzer, *supra* note 4, at 1018.

62. Dethlefs v. Beau Maison Dev. Corp., 511 So. 2d 112, 118 (Miss. 1987).

63. We see no tension in the modified notice pleading practice sanctioned by Rules 8 and 9. *See* Stanton & Assocs., Inc. v. Bryant Constr. Co., Inc., 464 So. 2d 499, 504-06 (Miss. 1985). We say this in light of the absence of any diligent inquiry requirement in Rule 11(a) and of the more important fact that frivolousness is an objective concept, not a subjective one.

64. The Litigation Accountability Act lists among the factors that should be considered "in determining whether to assess [sanctions] . . . and the amount to be assessed":

> The extent to which any action, claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in this state which purpose was made known to the court at the time of filing . . . .

MISS. CODE ANN. § 11-55-7(g) (Supp. 1988). Assuming an objective reading of "good faith," I find it hard to imagine a case fitting this definition that should not be immunized from sanctions, without regard to any advance notice to the court.

65. 518 So. 2d 1205 (Miss. 1988).

attorney who challenged the second accident doctrine prior to *Toliver v. General Motors Corp.*[66] have had to proceed in fear of Rule 11 sanctions? Should the plaintiff and attorney who attacked the locality rule prior to *Hall v. Hilbun*[67] have been subjected to monetary sanctions and penalties? What now of the party who challenges our employment at will doctrine[68] or the party who demands emotional distress damages where there has been no impact or objective physical injury?[69] I would answer all of these in the negative.

A special problem lurks in the world of the factually frivolous. I refer to the case where one's adversary is in exclusive possession and control of the facts. Consider the wrongful death case where all of the witnesses are under defendant's control, as in Jones Act or FELA cases,[70] or perhaps where there are no eyewitnesses at all. What about the products liability claim, particularly one alleging defective design? An early asbestosis case? Without extensive discovery and skillful cross-examination, the plaintiff is often quite helpless to make his case. Yet he must file a complaint – without really knowing whether he can prove his case – in order to obtain some legally enforceable means of requiring the defendant to submit to discovery.

The pleader is caught in a catch 22. Discovery is limited to matters relevant "to the issues raised by the claims or defenses of any party."[71] If he doesn't sign and file a pleading alleging the point, he may not compel his adversary to submit to discovery regarding it. When he makes the filing, however, he runs the risk that discovery may yield a dry hole followed by Rule 11 sanctions. I am loathe to say there is no hope of success in such a case, or more to the point, that such filers ought to be subject to Rule 11 sanctions.[72] Particularly is this so where the party has not pursued the claim past the point where there appears nothing further would be reasonably calculated to lead to the discovery of admissible evidence that would support the claim.

Our concern is with the filing that falls below that minimum level at which all lawyers are expected to perform. We are talking about legal malpractice, a filing so deficient that the fee-paying client would of right be entitled to her money back. A pleading or motion borders on the frivolous when it would not receive at least a "C" from the law professor's grading pen. We refer, of course,

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66. 482 So. 2d 213 (Miss. 1985).

67. 466 So. 2d 856 (Miss. 1985).

68. *See* Perry v. Sears, Roebuck & Co., 508 So. 2d 1086 (Miss. 1987); Shaw v. Burchfield, 481 So. 2d 247 (Miss. 1985).

69. *See* First Nat'l Bank v. Langley, 314 So. 2d 324, 329 (Miss. 1975). *But see* R. DWORKIN, *supra* note 30, at 225-50.

70. State courts have subject matter jurisdiction of Jones Act or FELA cases concurrent with that of the federal courts. *See* Penrod Drilling Co. v. Bounds, 433 So. 2d 916, 928-29 (Miss. 1983) (Robertson, J., concurring).

71. MISS. R. CIV. P. 26(b)(1).

72. The Litigation Accountability Act of 1988 lists, among the factors to be considered in determining whether to sanction, and how much, "[t]he availability of facts to assist in determining the validity of an action, claim or defense." MISS. CODE ANN. § 11-55-7(c) (Supp. 1988).

far more to the substance than to the form of the lawyer's product. The rules' modified notice pleading policy mandates such.

In my view a "no hope of success" definition of the frivolous is most consistent with the language and purposes of the rule.[73] That definition should apply to the legally frivolous and, as well, the factually frivolous. No doubt such a definition admits of no precise boundaries. There will always be borderline cases some trial judges will find frivolous, others not.[74] I trust all would find frivolous a defamation suit filed three years after the defendant's utterance in the face of a one-year statute of limitations.[75] Or the defendant who argues that contributory negligence bars the plaintiff's action[76] or who pleads as a defense lack of privity of contract.[77] And, as well, the plaintiff whose contract claim is clearly barred by the statute of frauds. Also without objective hope of success – and thus legally frivolous – would be a defendant's denial that a manufacturer defendant could be held liable absent plaintiff's proof of fault[78] or a plaintiff's denial that the court had authority to entertain defendant's motion for summary judgment.[79]

The Litigation Accountability Act of 1988 offers standards labeled differently, and perhaps misleadingly. Actions are frivolous if brought "without substantial justification."[80] These words connote a harsher standard than that I prefer. Surprisingly, however, "without substantial justification" is defined to mean "frivolous, groundless in fact or in law, or vexatious."[81] The definition is preferable to the label and not wholly consonant with it. The trouble area with the liability standard of the Act is found in the list of eleven factors courts are mandated to consider "in determining whether to assess [sanctions] . . . and the amount to be assessed."[82] Courts deciding sanctions motions with these standards on the table are, it seems to me, almost certain to impose sanctions in many cases where there was a reasonable hope of success. The factor list in section 11-55-7, about which I will say more below, seems quite capable of generating a de facto liability standard even tougher than that found in post-1983 Federal Rule 11. The potential for over-deterrence seems great, for that stan-

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73. The United States Court of Appeals for the Second Circuit calls it an "absolutely no chance of success" and "no reasonable argument" standard. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985).

74. *See* S. KASSIM, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS (Federal Judicial Center 1985), *cited in* Schwarzer, *supra* note 4, at 1016 n.15.

75. *See* MISS. CODE ANN. § 15-1-35 (1972).

76. *See* MISS. CODE ANN. § 11-7-15 (1972).

77. *See* MISS. CODE ANN. § 11-7-20 (Supp. 1987).

78. State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966). Is the result different if defense counsel applies great diligence and scholarship to the preparation of the brief arguing that Mississippi made a horrendous mistake in adopting Section 402A of RESTATEMENT (SECOND) OF TORTS? I think not.

79. MISS. R. CIV. P. 56; Brown v. Credit Center, Inc., 444 So. 2d 358 (Miss. 1983).

80. MISS. CODE ANN. § 11-55-5(1) and (4) (Supp. 1988).

81. MISS. CODE ANN. § 11-55-3(a) (Supp. 1988).

82. MISS. CODE ANN. § 11-55-7 (Supp. 1988).

dard will, if enforced, almost certainly deter filings, not just frivolous filings. Because it is incompatible with the best reading that may be given Rule 11, the Litigation Accountability Act standard should be disregarded.

Another general point regarding the Mississippi Rule 11 notion of the frivolous must be noted, for it is wholly at odds with post-1983 Federal Rule 11. No requirement of diligent inquiry is imposed,[83] nor does our Rule 11 recognize proof of diligent inquiry as a defense to a frivolous filing.[84]

This is more than a matter of linguistic choice. Two fundamentally different options are presented to the interpreter of Rule 11's liability trigger. Are we concerned with the conduct of parties and their attorneys or their product? Both are objective standards – that type standard suggested by the best reading and justification we may give (most of) Rule 11. As before, selecting one as the preferred standard is vital to our goal of consistent interpretations.

We return to the rule's purpose: to hold to an optimal level the social costs of frivolous filings. What causes those costs: parties'/attorneys' *conduct* or their *product*, for that cause is what we should rationally seek to deter? The question answers itself. That a(n objectively) frivolous pleading or motion is filed and pursued is what inflicts costs. No matter that the attorney spent a hundred hours or one hour in preparation for the filing, the social cost of that frivolous filing will remain unchanged.

A product standard fits the language of Rule 11. Consider first, the last sentence of Rule 11(a), the "certificate" rule. An attorney's signature on a pleading or motion constitutes his certificate that "to the best of his knowledge, information, and belief there is good ground to support it." Conspicuously absent is "after diligent inquiry" or other like words.[85] The rule suggests a duty of objective reflection on what is known, and a duty of reasonable conclusions. The certificate rule is not offended if a minimally competent attorney, knowing what was then known, would think it supported by "good ground," notwithstanding that he has not bestirred himself to find out.

Conversely, all the diligence in the world is no defense to the filing of a frivolous pleading or motion contrary to the last sentence of Rule 11(b).[86]

D. The Timing of the Frivolous Filing

There is a related question. At what point in the life of a civil action is frivolousness determined? A variety of scenarios leap to mind. The plaintiff files a com-

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83. Contrast federal practice. *See* Vairo, *supra* note 59, at 205-20.

84. The Litigation Accountability Act of 1988 suggests an inquiry test. MISS. CODE ANN. § 11-55-7(a) and (i) (Supp. 1988).

85. Federal Rule 11 now reads "after reasonable inquiry."

86. There are features of a conduct standard that are attractive. Punishing one who has tried hard goes against the grain. Some say a conduct standard is easier to insulate from judicial abuse of the sort some perceive in the federal courts. The problems are that a conduct standard, even when objectively administered, fails to strike the perceived evil and fails to fit the language of the rule.

plaint at a time when, on the basis of the information then collectively available to all concerned, he had no hope of success, only six months later to discover a bush witness who makes the claim. Or, suppose that at the time of filing, defendant has substantial control of the evidence on liability, e.g., a defective design case, and at the time of filing plaintiff has no way of knowing whether he can make out a jury issue. These situations and others that may readily be imagined suggest that the objective assessment of frivolousness be made on the basis of all that is known or has been known to all parties and the court at or prior to the time the Rule 11 motion is ruled upon. That the plaintiff had no objectively reasonable hope of success at the time he filed his complaint should never be the test. Nor should the Rule 11 court consider that the claim (or defense) in fact did not prevail at trial or otherwise. The question should be whether, at the time the Rule 11 motion is ruled on, and based on what by then has become known, there was an objective basis for believing that the claim had a chance of success.

The reason for this approach to timing is found in the rule's deterrent purpose. It is the frivolous filing we wish to stop. Rule 11 is not designed to end sloppy lawyering or to reduce lawyer procrastination. We have other means to those ends. To the point, I see no articulable reason why the claim or defense, seen with objectively reasonable hope of success after all has come to light, should be labeled frivolous just because the lawyer or party didn't know it wasn't frivolous at the time of filing. By the same token, I see no end based on fairness that would be served by holding such a claim or defense under Rule 11.

In the emotionally charged area of bad faith refusal litigation, it has never made sense to me that we should sanction an insurance company, where an objectively reasonable basis existed for refusal to pay a claim. That the insurer did not know of that arguable reason at the time of denial of the claim has always struck me as logically irrelevant – if in fact the objectively arguable reason existed.[87]

E. The Discretionary Nature of the Authority to Sanction

Another source of concern and confusion about the potency of Mississippi Rule 11 emanates from the discretionary nature of the sanctioning authority vested in the trial courts. Each statement of authority to penalize found in Rule 11(b) includes the word "may." Certain pleadings "may be stricken." Attorneys "may be subjected to appropriate disciplinary action." "[T]he court may order . . . [payment of] reasonable expenses . . . ." All of this is in contrast with the most celebrated feature of the new Federal Rule 11 and the inclusion there-

87. *Cf.* Bankers Life and Casualty Co. v. Crenshaw, 483 So. 2d 254, 273 (Miss. 1985). The fact that, due to negligent investigation or whatever, an insurer did not know of the arguable reason it may have for refusal to pay timely a claim, cannot proximately cause any legally cognizable damage the insured may suffer. The same rationale applies here.

in of the mandatory "shall."[88] This has led many federal courts to say that, upon finding of a violation of the liability standards of Rule 11, sanctions must be imposed[89] and in saying so to think they have said something important. For example, the Fifth Circuit has recently written: "There are no longer any 'free passes' for attorneys and litigants who violate Rule 11. Once a violation of Rule 11 is established, the rule mandates the application of sanctions."[90]

It takes but two seconds' thought to realize that new Federal Rule 11 is just as discretionary as its pre-1983 version and anyone who thinks otherwise seems a likely candidate to purchase stock in the company I am organizing to build a new bridge across the Yoknapatawpa River.[91] In cases where, under pre-1983 Rule 11, the district court would not be inclined to impose sanctions, the court today will merely find that there is no violation in the first place. Federal Rule 11's requirements that attorneys make "reasonable inquiry" and that their pleadings be "well-grounded in fact," etc. are quite open-textured and necessarily vest in any district court caring to use it enormous discretion with virtual immunity from reversal if that discretion is exercised discreetly. Furthermore, finding a violation of Rule 11 merely mandates the imposition of some sanction, and federal judges are then given broad authority to select just what sanction should be imposed and as well to modulate its severity.[92]

What has happened in the federal system is not that Federal Rule 11 has adopted a mandatory standard, but that a strong message has been given from the Rules Advisory Committee and the Supreme Court in promulgating the 1983 amendments that Rule 11 is to be taken seriously. It is not so much the new language that has wrought the explosion of Rule 11 litigation in the federal courts – that language, as explained, is as susceptible of discretionary interpretations as the old. What is new is the sub silentio "and we really meant it" behind Federal Rule 11.

The point for the moment, of course, is that there is no reason to think Mississippi's Rule 11 is in any significant way different from Federal Rule 11 with regard to the discretionary authority vested in trial courts. Yet before Mississippi's trial judges embolden themselves and begin imposing sanctions under Rule 11 with greater frequency and severity, we had best be sensitive to the

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88. The Litigation Accountability Act of 1988 also uses the mandatory "shall." MISS. CODE ANN. § 11-55-5(1) and (3) (Supp. 1988).

89. *See, e.g.*, Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 876 (5th Cir. 1988).

90. *Thomas*, 836 F.2d at 876.

91. *Discretionary* imposition of sanctions would be further guaranteed were we to embark upon a regime of enforcement of the Litigation Accountability Act of 1988. I refer to a structural defect in that Act. Section 3 contains the mandatory "shall," as explained above. MISS. CODE ANN. § 11-55-5(1) and (3) (Supp. 1988). Section 4, however, itemizes eleven factors which courts are charged to consider "among others, in determining *whether* to . . . [impose sanctions]." MISS. CODE ANN. § 11-55-7 (Supp. 1988) (emphasis added). This is another reason why the Mississippi judiciary should make no attempt to enforce the mandatory sanctions concept of the Act. Because of the discretionary language of Section 4, we can't.

92. FED. R. CIV. P. 11 advisory committee's note (1983).

federal experience and particularly to the massive problem of satellite litigation. Rule 11's efficiency purpose will hardly be served if litigants and courts become involved in extensive and unproductive litigation regarding the meaning and enforcement of Rule 11, for such will only increase, not decrease, the cost of litigation.

F. The Extra-Rule 11, Inherent Authority to Sanction Abuse of the Judicial Process

We have taken several swipes at the draftsmanship of Rule 11 – and there are more to come. In this context we regard it quite important to recognize that Rule 11 is by no means the exclusive source of authority for courts, and in particular trial courts, to impose sanctions upon attorneys who make frivolous filings. We have alluded elsewhere to the court's inherent powers. The point should be fleshed out a bit.

Courts of this state have always been regarded as having the inherent power to regulate the conduct of the officers who appear before them and to impose sanctions where appropriate, notwithstanding absence of statute or rule.[93] When attorneys violate rules of practice, courts of this state have the inherent authority to impose monetary fines or sanctions, though there be no written rule expressly authorizing same.[94] The authority extends to and includes imposing non-monetary sanctions as well. Against this backdrop, drafting deficiencies, such as the absence of the word "attorney" in the last sentence of Rule 11(b), are seen as no obstacle to the court's authority to impose monetary sanctions upon attorneys who make frivolous filings or filings for the purpose of harassment or delay.

V. THE RULE 11 CERTIFICATE

The last sentence of Rule 11(a) reads: "The signature of an attorney constitutes a certificate by him that he has read the pleading or motion; that to the

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93. *See* Bramlett v. Burgin, 382 So. 2d 284, 285 (Miss. 1979); *In re* Fox, 296 So. 2d 701, 702 (Miss. 1974).

94. *See* Allison v. State, 436 So. 2d 792, 796 (Miss. 1983); Scott v. State, 310 So. 2d 703, 706 (Miss. 1975). *But see* Aeroglide Corp. v. Whitehead, 433 So. 2d 952 (Miss. 1983). Some federal courts recognized that attorneys' fees and costs could be awarded under pre-1983 Federal Rule 11. For example, in Driscoll v. Oppenheimer & Co., Inc., 500 F. Supp. 174, 175 (N.D. Ill. 1980), the court found that attorneys' fees may be awarded in the exercise of its "inherent power" under Rule 11. *See also* Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1166-67 (7th Cir. 1983) (attorneys' fees may be an appropriate sanction under Rule 11); Hedison Mfg. Co. v. NLRB, 643 F.2d 32, 35 (1st Cir. 1981) (frivolous nature of contentions made award of counsel fees and expenses appropriate); Anderson v. Allstate Ins. Co., 630 F.2d 677 (9th Cir. 1980) (attorney sanctioned for having abused court's process); Public Interest Bounty Hunters v. Board of Governors, 548 F. Supp. 157, 160 (N.D. Ga. 1982) (Rule 11 "corroborates" authority to impose attorneys' fees for abuses of judicial process); LeGare v. University of Pa. Medical School, 488 F. Supp. 1250, 1257 (E.D. Pa. 1980) (motion for costs and fees denied because too early in the litigation "to make informed judgments as to whether the action is groundless"); Textor v. Board of Regents of N. Ill. Univ., 37 Fed. R. Serv. 2d 291, 298-99 (7th Cir. 1983) (monetary sanctions may be awarded, but only after a hearing; burden of proof on party seeking the award). *Aeroglide* is incorrect insofar as it suggests lack of authority. The opinion should have held that the trial court abused the discretionary authority it undoubtedly possesses.

best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."

These words begin to supply the substance reflected in the familiar idea of the Rule 11 certificate. They are taken verbatim from pre-1983 Federal Rule 11, except that "pleading" has been expanded into "pleading or motion." The sentence gives meaning to the signature requirement, which precedes it.

When an attorney signs a pleading or motion, he is acting in his capacity as an officer of the court and is making three substantive representations. The first of these is often overlooked: "that he has read" it. Yet few familiar with big firm law practice can be unaware that not infrequently lawyers sign and have filed pleadings and motions they have not read.[95]

Second, the attorney's signature represents to the court "that to the best of his knowledge, information, and belief there is good ground to support it." This is the duty of objectively reasonable reflection mentioned above. We have already rejected the idea that this language includes any requirement of diligent inquiry. We recognize that such a notion may be found trailing around in some of the pre-1983 federal cases. We reject it because it does not appear in the language of the rule. A reading that would require diligent or reasonable inquiry simply does not fit the text we interpret.

Good reasons become apparent as to why a diligent inquiry principle would not be desirable. The extent to which lawyers have opportunity to inquire varies radically with the case. The wrongful death plaintiff's counsel may have no one to inquire of. Other counsel may have dozens or hundreds of potential witnesses available. The statute of limitations may be about to run, leaving one no time to inquire. More significantly, diligent inquiry standards run the risk of importing subjectivity into the rule. It may divert our attention from the objective question whether a filing is frivolous, for it is the frivolous filing that imposes costs upon opposing parties and the court, and the experience of such costs often has nothing to do with the extent of pre-filing or post-filing inquiry. A diligent inquiry standard would often penalize the competent lawyer while exonerating the dullard.

The third representation the lawyer makes when he signs the pleading or motion is that "it is not interposed for delay." We consider this to encompass the filing made for the dominant purpose of delay *and* where an objective assessment of the circumstances immediately preceding filing would not lead a minimally competent lawyer to believe some delay is needed in the legitimate interest of his client. At the very least the word "delay" in the rule should be read "unnecessary delay" or "unjustifiable delay."

The principal difficulty with the certificate requirement of Rule 11(a) is the

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95. I am reminded of the storm President Carter generated when, upon taking office in 1977, he ordered that department heads *read* all regulations promulgated under their names.

lack of an express sanction. There is no other provision of the rule adequately empowering courts to impose a sanction upon attorneys who make a false certificate. The second sentence of Rule 11(b) authorizes a sanction for wilful violation, again generating the subjectivity problem. Besides, few members of the bar are unable to come up with some sort of a half-baked justification for a challenged filing, sufficient to avoid a "wilful" finding. All of this inevitably causes the thought that the Rule 11(a) certificate imposes little more than a moral obligation.

I do not take such a view. Instead, the Rule 11(a) certificate requirement ought to be read in the light of the court's inherent authority to impose sanctions upon attorneys who abuse the machinery of justice. Filing a pleading or motion knowing that there are no grounds to support it, or filing where a major purpose is delay and without objective belief that delay is needed in the interest of justice, is an abuse of the machinery. As explained above, the court has authority to protect itself and its legitimate litigants in the face of such, notwithstanding that explicit authority may not be found in Rule 11.

VI. THE SANCTIONS PART OF RULE 11

Our primary concern is ascribing meaning to the sanctions provisions of Rule 11, those found in Rule 11(b). We say this, sensitive to the oft-expressed observation that post-1983 Rule 11 litigation in the federal courts has yielded significantly inconsistent and varying interpretations, both on "liability" and sanctions issues, from district to district and from day to day.[96] Suffice it to say that our goal ought to be a reading of Rule 11, and particularly of Rule 11(b), that is the same in the Circuit Court of Tishomingo County as in the Chancery Court of Wilkinson County.

Yet there is a tension tugging against consistency in interpretation. The approach to interpretation that is adequate to deter violations by parties and litigants operating on a contingency fee basis may be quite different from that adequate in hourly rate cases. And what about fixed fee litigation? Minimal fee cases, such as many domestic relations cases?

Beyond that, there are a variety of types of action which may be filed in the courts of this state where because of legislative enactment, plaintiffs may have attorneys' fees assessed to defendant in the event the plaintiff succeeds. The purpose of these fee shifting statutes has in substantial part been to remove economic deterrents to the bringing of lawsuits of these types. Enforcement of Rule 11 sanctions against plaintiffs in these types of cases may well run counter to the statutory purposes of encouragement of these types of litigation. Beyond all of this, we can say without fear of contradiction that Rule 11(b) is one of the most poorly drafted provisions in the entire Mississippi Rules of Civil Proce-

96. Schwarzer, *supra* note 4, at 1015-17.

dure and we can easily see how construction might be regarded by many as a veritable nightmare.

These concerns on the table before us, we will suggest an appropriate construction of Rule 11(b). We begin by recognizing that the rule has four separate provisions which authorize the imposition of sanctions. But that is not all they do. They contain liability standards as well, some of which dwarf those of Rule 11(a), with the possible exception of the Rule 11 certificate. Rule 11(b) consists of four separate unnumbered sentences. Little consistency may be found from one to the others in form, wording or concept. Still, three questions can and must be asked – and answered – in the case of each subpart of Rule 11(b): What sort of conduct constitutes a violation? Against whom may a sanction be imposed – the party or the attorney or both? What sanction may be imposed, including what type of sanction and with what severity? We approach these questions against the backdrop of the general considerations outlined in Section III above.

A. The Frivolous Filing Made with Intent . . .

The first unnumbered sentence of Rule 11(b) reads: "If a pleading or motion is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading or motion had not been served."

1. What Is the Liability Standard?

This sentence actually contains two primary rules of obligation. First, a pleading or motion must be signed. Failure to sign is a violation. Common sense suggests, of course, that if the failure to sign is inadvertent or accidental, the party or the attorney should be given a reasonable opportunity to sign it.[97]

The more difficult liability standard is the second one, for there is a violation if a pleading or motion is signed "with intent to defeat the purpose of this rule." The phrase "this rule" no doubt refers to the entire Rule 11. But as noted above, the rule contains no statement of purpose. Rather, purpose must be derived and, as explained above, we have identified the dominant purpose of the rule as a utilitarian one: general deterrence of frivolous filings.

What meaning then should be ascribed to the phrase "signed with intent to defeat . . . ."? Should intent be read subjectively or objectively? Are we concerned with the pleader's or movant's actual state of mind – and, if so, at what point in time; or are we concerned with what he reasonably ought to have known had he thought about the matter, taking the standard of reasonableness from the average person standing in the shoes of the movant or pleader, be he lay litigant, country lawyer, or highly experienced and specialized litigator? Either

97. The Federal Rule provides: "If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant."

approach fits the language of the rule. We know from experience that every lawyer is capable of convincing himself of the legitimacy of practically any proposition imaginable. For this reason a subjective intent standard simply won't work.

Practical reality dictates that the intent standard must be an objective one. Any attempt to ascribe a subjective meaning will likely result in courts reading the rule objectively, holding lawyers to account for filings they reasonably ought to have known were frivolous. Beyond that, inquiries into what was actually in the mind of the movant or pleader seem far more likely to lead to ad hoc results from case to case and from county to county and, as well, to disserve the purpose of providing deterrence for frivolous filings.

Having in mind what has been said above, the liability standard of the first sentence of Rule 11(b) should read as follows: "If a pleading is signed, filed, served and pursued with objective intent to undermine the purpose of the rule, to-wit: deterrence of frivolous filings, ..."

2. Against Whom May the Sanction Be Imposed?

The sanction is imposed against the party. The remainder of the sentence limits the form of sanction to striking the motion or pleading. Common sense suggests that such an action is a direct sanction only against the party. The attorney isn't hurt when the pleading is stricken; the party is.

Of course, an attorney who files a motion or pleading, without complicity on the part of the client, in violation of the liability standards of the first sentence of Rule 11(b), only to find it stricken by the court, may well find himself a defendant in a legal malpractice action.

3. What Sanction May Be Imposed?

The only sanction authorized is striking the pleading or motion.[98] In one of the few clear provisions of Rule 11(b) we find the language "and the action may proceed as though the pleading or motion had not been served." The words "sham and false" are meaningless at best and confusing at worst, and should be deleted from the rule as soon as possible, and until then ignored.

B. The Wilful Violation Rule

The second sentence of Rule 11(b) reads: "For wilful violation of this rule an attorney may be subjected to appropriate disciplinary action."

1. What Is the Liability Standard?

The liability standard here refers to the entire rule and speaks of a "wilful violation." The juxtaposition of this language with the rest of the rule precludes our preference for objective standards and instead mandates a subjective stan-

98. Striking a party's pleading is a sanction also authorized for violation of our discovery rules and may result in dismissal of the lawsuit altogether. *See* Williams v. Puryear, 515 So. 2d 1231 (Miss. 1987).

dard, not an objective one. Limiting the individual upon whom sanctions may be imposed to the attorney, again in proper context imports a subjective standard. An attorney offends this standard when he knowingly and deliberately files a pleading or motion for the purposes of delay, when he knowingly or deliberately files a motion or pleading which he in fact knows is frivolous, or when he knowingly and deliberately files a motion or pleading for the purpose of harassing another party and imposing unreasonable expense upon him.

2. Against Whom May the Sanction Be Imposed?

The person against whom sanctions may be imposed is limited to the attorney.

3. What Sanction May Be Imposed?

Here we confront the one sentence of Rule 11 that suggests a purpose other than deterrence. The liability standard connotes improper purpose as that which offends the rule. "[D]isciplinary action" is authorized, which again imports a punitive purpose. This combined with the subjective wilfulness test relegates to by-product status our generally applicable general deterrence rationale for the rule.

The sanction authorized is "appropriate disciplinary action." This phrase should be construed to include all sanctions that a court has power to take against any attorney for misconduct in the course of litigation. Possible sanctions certainly include imposition of monetary penalties and, in the event of extreme violations, imprisonment.[99] Lesser non-monetary sanctions are available as well. The trial court certainly has discretionary authority, in addition to or in lieu of judicial sanctions, to refer the matter to the Complaints Committee of the Mississippi State Bar for disciplinary action.

C. Scandalous Or Indecent Matter

The third sentence of Rule 11(b) reads: "Similar action may be taken if scandalous or indecent matter is inserted." Interpretation regarding the parties against whom the sanction may be imposed and the nature and extent of the sanction obviously are the same as those in the case of the second provision just discussed. The liability standard, however, is more problematical, for the words "scandalous or indecent matter" are quite vague and susceptible of varying interpretations. These are words with respect to which the core of certainty of their meaning is small and the penumbra of doubt is great. Courts should be

99. Such a proceeding would be one for criminal contempt, vesting the attorney with the familiar panoply of procedural safeguards. *See* Culpepper v. State, 516 So. 2d 485 (Miss. 1987); Cook v. State, 483 So. 2d 371, 374 (Miss. 1986).

slow to invoke this standard for imposition of Rule 11 sanctions.[100]

D. The Frivolous Filing - and the One Made for Harassment or Delay

By far the most important sanctioning provision of Rule 11(b) – arguably the most important sentence in the entire rule – is found in the last unnumbered sentence which reads:

> If any party files a motion or pleading which, in the opinion of the court, is frivolous or is filed for the purpose of harassment or delay, the court may order such a party to pay to the opposing party or parties the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees.

This sentence, it will be recalled, was not a part of pre-1983 Federal Rule 11 and was added independently by the draftsman of Mississippi Rule 11.

1. What Is the Liability Standard?

The liability standard of this rule may be read to subsume that found in the first sentence of Rule 11(b) and, as well, the obligation imposed in the certificate sentence of Rule 11(a). Indeed, persuasive argument can be made that the only provision of the entire Rule 11 not rendered moot or redundant by this last sentence is that found in the second sentence of Rule 11(b), the sentence authorizing "appropriate disciplinary action against attorneys for 'wilful violations.'" As noted above, this latter provision is the only one that talks of subjectively wilful violations. The last sentence regarding frivolous filings and harassment or delay in no way requires that the conduct has been wilful.

The first point apparent in the language here under scrutiny is that we are again concerned with an objective standard. Proscribed are motions or pleadings which "in the opinion of the court" are "frivolous" or are "filed for the purpose of harassment or delay." If the court applying an objective test of frivolousness or harassment or delay finds a violation, that is all that is necessary to authorize imposition of the sanction. On the question of frivolousness, the point is conceptually easy. The court looks at the paper challenged under Rule 11 and, applying the no-hope-of-success standard discussed above, decides whether it is frivolous. Inquiry regarding the subjective intent or motivation or reasonable belief of either the party or his attorney is simply not germane.

The best reading of the "for the purpose of harassment or delay" prong also connotes an objective test. A pleading or motion is filed for the purpose of harassment or delay if the party or attorney knew or reasonably should have known

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100. *See* Wheat v. Eakin, 491 So. 2d 523 (Miss. 1986). A pro se pleader employed rather earthy language in denying plaintiff's claim. The court's suggestion, "If an attorney had used such language in a pleading to the court, he would have been subject to discipline," 491 So. 2d at 526, is arguably correct, though it shows a marked lack of a sense of humor. We have no law proscribing such in the conduct of attorneys, only a long tradition to that effect.

that it would have the effect of harassment or delay. Reasonably should have known, of course, is a standard having reference to others similarly situated – lay litigants, country lawyers and big firm specialists. The question is whether the party sought to be sanctioned, having in mind his level of experience and understanding, reasonably should have known that the filing would harass a party or unfairly delay his cause.[101]

The more important question is whether a filing may trigger the court's authority to sanction when it is "filed for the purpose of harassment or delay" but when, applying the test of frivolousness described above, the court cannot say that it is frivolous. Fidelity to text answers in the affirmative, as the disjunctive "or" lies unmistakably in the language. The sanction may be imposed in either event – the filing of a motion or pleading which is frivolous or one which is filed for the purpose of harassment or delay.

But what policy consideration might lead a lawmaker to create a law that would sanction a filing that is not frivolous, even though objectively for harassment or delay purposes? As long as the filing is not frivolous, should not the adversary system give equal rein to each litigant to seek tactical advantage through harassment or delay?[102] One can think of dozens of types of non-frivolous filings our law allows, even encourages, even though such will surely have the effect of harassment or delay – ranging from motions for summary judgment to discovery to post-trial motions.

Returning to our derivation of a deterrent purpose for Mississippi Rule 11 – holding the cost of litigation to an optimally efficient level – one type of motion suggests itself as a most eligible candidate for sanctions when filed for harassment or delay, even when non-frivolous. I refer to the motion for sanctions itself, whether filed under Miss. R. Civ. P. 37, or even under Rule 11.[103] In the first place, such motions are "motions" within the coverage of Rule 11 and particularly the last sentence of Rule 11(b). More substantial is the reality that motions for sanctions are at best satellite litigation, time-consuming, expensive and bitterly contested, and often contribute little or nothing to the ultimate just determination of the civil action. Satellite litigation absorbs the resources and energies of the judiciary as well as the litigants. There is special reason to deter it, even when meritorious.

There is a special sort of Rule 11 motion that should be scrutinized with care under Rule 11(b)'s "purpose of harassment" standard. The context has been noted

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101. This standard is a loose functional equivalent of the standard conceptualized in Hall v. Hilbun, 466 So. 2d 856, 871-73 (Miss. 1985) and applied to physicians in medical malpractice cases.

102. This is as good a point as any to emphasize that nothing said anywhere herein should be read as a retreat from my strongly held views regarding the zeal with which an attorney is obligated to advocate his client's cause, *see* Robertson, *The Lawyer As Hero,* 53 Miss. L.J. 431 (1983), only that courts are not always obligated to let lawyers get away with all that the lawyer may be obligated to do.

103. *See* Canton Farm Equip., Inc. v. Richardson, 501 So. 2d 1098, 1109 n.12 (Miss. 1987). The motion for costs under Miss. R. Civ. P. 56(h) is also the type of motion susceptible of treatment as suggested above in the case of Miss. R. Civ. P. 11 and 37.

in Part IV(C) above: all of the evidence is under the control of one's adversary, usually a defendant, e.g., in a wrongful death or products liability case. Not infrequently, as a matter of hard-nosed pre-trial tactics, such a defendant will simultaneously pursue his Rule 11 motion on grounds that plaintiff's claim is frivolous and at once resist all meaningful discovery, thus implicity acknowledging that the claim is not frivolous. Perhaps withdrawal of objections to discovery ought to be made a pre-condition to the Rule 11 motion, though I am not for the moment prepared to go so far. What is apparent is that simultaneous objection to discovery and pursuit of a Rule 11 motion for sanctions suggests a purpose of harassment itself worthy of a stinging response.

The adversary system being what it is, few lawyers and litigants can resist an opportunity to bring pressure to bear upon the opposition. Sanction motions, under Rule 37 or under Rule 11, can be most potent tools to this end. The hard-nosed adversary can use Rules 37 and 11 to divert the opposition's time and attention from other matters, to inflict expense and, through the certainty that such motions must be resisted and the possibility that such motions might succeed, to chill the adversary's zeal for the case. For better or for worse, the civil action today is rare where at some point some litigant does not try to exact sanctions of some sort from the other.

Without fear of contradiction, I suggest that often these motions for sanctions are frivolous, but even where non-frivolous, they are often in substantial part for harassment or delay. Lawyers should be made to "stop and think" before moving for sanctions under Rule 37 or Rule 11.

Here the federal experience has much to teach us. Consensus abounds that post-1983 Federal Rule 11 has given off incentives to litigants to engage in satellite litigation. Whether these incentives emanate from the language of the new rule or from apocryphal warnings Professor Arthur Miller gave rebellious students at the Harvard Law School more than a decade ago, they are there. The most often identified problem with new Federal Rule 11 is the sheer quantity of satellite litigation it has generated, with its attendant consumption and waste of judicial and litigant resources.

To date few have received such incentives from Mississippi's Rule 11. Whether this is for some or all of the reasons mentioned at the outset, or simply because the rule has been on the books for only a few years, I do not know. What is important is that we still have the chance – and the challenge – to bring our baby up right. Sensitive enforcement of Rule 11 against motions for sanctions under Rules 37 and 11, where a substantial purpose of such is harassment or delay, just may in the long run keep Mississippi's judiciary out of the satellite litigation swamp.

A more specific candidate for the harassment or delay sanction need be noted. I refer to the Rule 11 motion predicated upon the opposition's assertion in pleadings of a frivolous claim or defense which is then allowed to lie fallow

and is not pursued. The party who made the frivolous filing has offended Rule 11. But he has inflicted little or no cost upon the opposition or upon the court. A Rule 11 motion filed against the party making the offensive plea would by definition be non-frivolous. Yet such a motion could only be filed for the purpose of harassment, to teach a lesson either to the party or the lawyer, or both. Or, perhaps counsel for a deep pocket defendant may make non-frivolous Rule 37 or Rule 11 filings as a part of an overall strategy to make the litigation so costly that the plaintiff will run out of money before trial. Rule 11 stands as a potent weapon we may wield to the end that such schooling be done off the school yard and without taking up precious judicial time and resources.

We need revisit briefly the certificate requirement of Rule 11(a), for a potentially troublesome tension within the rule arises from reading the objective standard of frivolousness found in the last sentence of Rule 11(b) in context with the attorney's certificate proviso. The attorney's signature, it will be recalled, constitutes a certificate by him, inter alia, that to the best of his knowledge, information, and belief there is good ground to support it. We have rejected the notion that this imposes a requirement of reasonable inquiry prior to the signing of the pleading or motion. Still, on the question of the nature and quantum of sanction, the court (its eye fixed to the star of general deterrence) may appropriately consider the extent of inquiry, the time available for investigation, the extent to which the attorney had to rely upon the client for factual information, whether the paper was based upon a plausible view of the law and whether the attorney depended upon another member of the bar.[104]

Frivolous filings no doubt result from failure of inquiry. They are an obvious risk of shooting from the hip. Yet it is not at all necessary, as reflection makes clear, that there be a connection between the attorney's certificate and some duty of inquiry, on the one hand, and the objective frivolous standard on the other. A motion or pleading may well escape condemnation as frivolous notwithstanding that the lawyer dashed it off in a fit of pique without making the slightest inquiry whether there was good ground to support it. By the same token, a lawyer may well investigate fully a particular matter and yet make a filing which is objectively frivolous (although we trust that the number of members of the Mississippi State Bar capable of such incompetence is minimal).

The point is of consequence because of the idea we have rejected above but which is sincerely held by some: that the certificate requirement of Rule 11(a) might as well be regarded as imposing a moral or professional obligation upon attorneys, which is not directly subject to enforcement by the court.[105] By way

104. *Cf.* Section 4 of the Litigation Accountability Act of 1988, MISS. CODE ANN. § 11-55-7 (Supp. 1988).

105. Holmes argued – erroneously in my view – that a right or duty had no existence "apart from and independent of the consequences of its breach." Holmes, *supra* note 31, at 458. Absence of a sanction does not deprive a rule of its status as law. H.L.A. HART, *supra* note 20, at 35-41, 97-107; *see also* Whitten & Robertson, *supra* note 28, at 263-64 & nn.66-68.

of contrast, the frivolous filings proviso of the last sentence of Rule 11(b) and as well the harassment or delay provisions, are subject to enforcement wholly without regard to the certificate provision of Rule 11(a).

Another matter of concern arises in the case of the motion or pleading which contains several grounds, one of which is frivolous and the other of which is not. Consider, for example, the complaint which presents a quite justiciable claim for contract damages and perhaps even extra-contractual tort damages but then throws in a frivolous claim for punitive damages.[106] And what of the answer which asserts a quite arguable denial of the factual basis of liability and an alternative pleading of our comparative negligence statute but adds a frivolous defense of assumption of risk. The same sort of "multifariousness" may appear in motions as well.

In one sense the answer would seem to be that pleadings and motions such as these do not give rise to liability under the fourth sentence of Rule 11(b). The language of the rule refers to pleadings and motions without any express reference to mere parts thereof. On the other hand, common sense suggests that a party may well subject his adversary and the judicial system to a wholly unnecessary expenditure of time, funds and other resources in the pursuit of a frivolous claim for punitive damages or a frivolous defense of assumption of risk. I find nothing in the language of the liability standard of Rule 11(b)'s fourth sentence that precludes treating pleadings and motions as divisible,[107] or which precludes focus upon parts of pleadings and motions which are frivolous. When frivolous claims or defenses are not only signed but also filed, served and pursued, and where delay and expense is in fact incurred by the opposing party, not to mention consumption of judicial resources, Rule 11 may appropriately be invoked.

2. Against Whom May the Sanction Be Imposed?

Turning to the question of who may be subject to the sanction, we find the last sentence of Rule 11(b) employing only the word "party." Quite clearly the rule authorizes imposition of the sanctions upon a party who makes a frivolous filing or one for the purpose of harassment or delay.

The more important question is whether, under this part of the rule, sanctions may also be imposed upon the attorney independent of the party/client, or jointly and severally with the party. The question is of great practical importance for the obvious reason that, in the overwhelming majority of frivolous filings, the root cause of the expense and delay may be attributed to the attorney, not the party. If the court does not have the authority to impose sanctions

106. *See* Tideway Oil Programs, Inc. v. Serio, 431 So. 2d 454, 460 n.1 (Miss. 1983) ("[E]very attorney filing a complaint demanding punitive damages does so subject to the provisions of Rule 11 . . . .").

107. In the Litigation Accountability Act of 1988, the word "action" is defined to include: "any separate count, claim, defense or request for relief." MISS. CODE ANN. § 11-55-3(c) (Supp. 1988). But are motions similarly divisible? *See* MISS. CODE ANN. § 11-55-3(a) (Supp. 1988).

upon attorneys for frivolous filings, Rule 11 is indeed a toothless tiger. No doubt there are occasions when litigants take actions and direct filings toward their adversary which are frivolous and which are for the purpose of harassment or delay. In the overwhelming majority of cases, however, the litigant takes his cue from his lawyer.

The argument may be advanced that the term "party," as used in the last sentence of Rule 11(b), should be read as including the attorney. After all, the party doesn't actually file a motion or pleading in the overwhelming majority of cases. That is in fact done by the attorney. The party certainly is inferior to the attorney when it comes to acumen with which to determine whether a pleading is frivolous.[108] If the question be put, why would anyone draft a rule such as the last sentence of Rule 11(b) and not include attorneys as well as parties as those subject to the sanctions? No reason readily suggests itself. If the purpose of the rule is to deter frivolous filings, why would a draftsman want to authorize sanctioning of the persons who infrequently would cause cost and delay and exclude from the sanction power those who most frequently would cause it?

Any gaps in the language of the rule here ought to be filled by reference to the court's inherent authority to sanction attorneys for misconduct affecting the administration of justice.[109] And, because it is wholly consistent with the implicit meaning of Rule 11(b), as augmented by the court's inherent powers, the Litigation Accountability Act of 1988 here furnishes a valuable guide to interpretation, as it authorizes assessment of sanctions "against the offending attorneys or parties, or both."[110]

There is a final point. Where monetary sanctions are imposed on an attorney, there will always be the possibility that in whole or in part the sanction sum will make its way into the bill sent to the client. I am not prepared to say that this should never be allowed. Many are the cases, however, where the class of individuals we seek to deter will be lawyers. In those cases the court ought to place within the sanction order an express prohibition upon direct or indirect payment by the client.[111]

3. What Sanction May Be Imposed?

The sanction here authorized certainly includes "the reasonable expenses incurred by such other parties and by their attorneys, including reasonable attorneys' fees." Inherent within the court, however, is the authority to impose such greater or lesser sanctions as striking a party's motion or pleading, assessing

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108. The suggestion in Dethlefs v. Beau Maison Dev. Corp., 511 So. 2d 112, 118 (Miss. 1987) that parties are held to the same standards as attorneys may fit the language of Rule 11. Yet it is so intuitively implausible that I doubt it is the best fit. *See supra* note 101 and accompanying text.

109. *See supra* Part IV(F).

110. MISS. CODE ANN. § 11-55-5(3) (Supp. 1988).

111. *Cf.* Goeldner v. Mississippi State Bar Ass'n, 525 So. 2d 403, 407 (Miss. 1975).

a monetary fine or penalty, and, in the event of extreme violations, rising to the dignity of contempt of court, ordering incarceration.[112]

VII. THE QUANTUM OF SANCTIONS

A. What the Litigation Accountability Act Has to Offer

Monetary sanctions are by no means the only sanctions authorized by Rule 11. As a practical matter, they are the most important, those most likely to be imposed with relative frequency, and those certain to generate the most controversy. We have considered the liability standards above and have found that, notwithstanding substantial problems with draftsmanship and structure of Rule 11, a modest sense of order may be gleaned. On the question of the quantum of monetary sanctions, however, the rule takes the opposite approach, one of near silence. We are told only that, for frivolous filings, the court may order payment of "reasonable" expenses and attorneys' fees. For wilful violations the court may order "appropriate" disciplinary action. But "reasonable" or "appropriate" by reference to what standards or considerations?

Here at first blush the Litigation Accountability Act would appear to offer valuable aid to construction of Rule 11. Section 4 enumerates eleven factors which the Act insists ought to be considered in determining the amount of sanctions.[113] Yet caution is in order.

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112. Culpepper v. State, 516 So. 2d 485 (Miss. 1987) was reversed because the charge was brought in the wrong jurisdiction, not because the court had no inherent authority to impose a monetary fine and jail term upon an attorney for constructive criminal contempt.

113. MISS. CODE ANN. § 11-55-7 (Supp. 1988). The entire section reads:

§ 11-55-7. Award of costs and attorney fees; amount of award; factors to consider.

In determining the amount of an award of costs or attorney's fees, the court shall exercise its sound discretion. When granting an award of costs and attorney's fees, the court shall specifically set forth the reasons for such award and shall consider the following factors, among others, in determining whether to assess attorney's fees and costs and the amount to be assessed:

(a) The extent to which any effort was made to determine the validity of any action, claim or defense before it was asserted, and the time remaining within which the claim or defense could be filed;

(b) The extent of any effort made after the commencement of an action to reduce the number of claims being asserted or to dismiss claims that have been found not to be valid;

(c) The availability of facts to assist in determining the validity of an action, claim or defense;

(d) Whether or not the action was prosecuted or defended, in whole or in part, in bad faith or for improper purpose;

(e) Whether or not issues of fact, determinative of the validity of a party's claim or defense, were reasonably in conflict;

(f) The extent to which the party prevailed with respect to the amount of and number of claims or defenses in controversy;

(g) The extent to which any action, claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in the state, which purpose was made known to the court at the time of filing;

(h) The amount or conditions of any offer of judgment or settlement in relation to the amount or conditions of the ultimate relief granted by the court;

(i) The extent to which a reasonable effort was made to determine prior to the time of filing of an action or claim that all parties sued or joined were proper parties owing a legally defined duty to any party or parties asserting the claim or action;

(j) The extent of any effort made after the commencement of an action to reduce the number of parties in the action; and

(k) The period of time available to the attorney for the party asserting any defense before such defense was interposed.

To begin with, the Litigation Accountability Act identifies assessment of attorneys' fees and costs as the only sanctions that may be imposed. Because of the court's inherent authority to discipline attorneys, the statutory limitation should be disregarded. The court has the power to penalize or fine attorneys for frivolous filings above and beyond any attorneys' fees or costs actually inflicted on the adversary. Conversely, where general deterrence would not be served, there is certainly no mandate that full attorneys' fees and costs be assessed.

Second, and quite related, Section 4 of the Act contains a structural defect. As indicated, the only sanction authorized is "costs or attorney's fees." This suggests a compensatory rationale for the Act. Yet the same Section 4 fails to include, as a factor to be considered, the amount of attorneys' fees or costs incurred by the adversary. Perhaps this is one of the "among others" factors. Not only do the eleven factors clash with the compensatory rationale of the award of attorneys' fees and costs, the factors commingle the objective, e.g., the availability of facts, etc.,[114] with the subjective, e.g., "[t]he extent to which any effort was made to determine . . ." and "[w]hether or not the action was prosecuted or defended, in whole or in part, in bad faith or for improper purpose."[115] Several of the standards appear downright dangerous, e.g., "[t]he extent to which the party prevailed."[116]

The factors found in Section 4 are far too numerous. To be sure, balancing tests are a part of the permanent legal landscape in this country. Experience has taught, however, that balancing tests including too many factors will augment, rather than reduce, arbitrariness and inconsistent results.[117] Generally three are the optimum; four the maximum; eleven are a veritable disaster.

When so many factors are listed, they will, as here, inevitably proceed upon different and conflicting and even incoherent principles and policies, making consistent application from jurisdiction to jurisdiction and from day to day simply impossible. This is particularly so when we are without any guide to the weight to be accorded the several factors, or by what burden or standard the balancing should be employed.[118]

If the Section 4 factors are to be used, we must keep firmly in mind that they inform only the quantum inquiry, that they have nothing to do with Rule 11

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114. MISS. CODE ANN. § 11-55-7(c) (Supp. 1988).

115. MISS. CODE ANN. §§ 11-55-7(a) and (d) (Supp. 1988).

116. MISS. CODE ANN. § 11-55-7(f) (Supp. 1988).

117. Compare the experience under such diverse balancing tests as the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS, § 6 (1971) (factors to be considered in locating the "center of gravity" of an action) and Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974) (factors to be considered in awarding attorneys' fees).

118. In another context I have argued that the persons charged by law to perform the law's balancing functions must be given some standard by reference to which the weighing and balancing must be performed, else arbitrary and inconsistent results again are inevitable. *See* Hill v. State, 432 So. 2d 427, 451-52 (Miss. 1983) (Robertson, J., dissenting). It is not so important *what* the standard is as that there be *some* standard.

liability.[119] I doubt, however, that this is possible. So much in Section 4 suggests imposition of sanctions where the pleader or movant did have hope of success, or where his purpose was not harassment or delay. The very structure of the Act, which directs consideration of these particular factors without guidance on the quantum of sanctions depending solely upon how a given factor or factors may strike the court on a given day, all but assures that in practice the no hope of success standard will be greatly toughened.

Consider, for example, factor (a), the extent to which there was opportunity for diligent inquiry and the extent to which such inquiry was made.[120] We have critiqued this notion above in the context of the liability standard. Concededly, it is less problematic as a sanctions factor. Still it seems out of place. It places too great an emphasis upon the individual work habits and other idiosyncrasies of lawyers. The degree of frivolousness, or some such, would seem a more relevant factor, given our rule characterized largely by objective standards and its purpose of holding the cost of frivolous filings to an optimally efficient level via a regime of general deterrence.

Factor (i), the extent to which a reasonable effort was made prior to filing to determine that the parties sued were proper in that they owed "a legally defined duty" to plaintiff,[121] is subject to similar critique and dismissal.

Consider, next, factors (b) and (j), the extent to which any effort was made after commencement of the action to reduce the number of claims being asserted[122] or the number of parties to the action.[123] For one thing, I do not regard it readily apparent that plaintiff – and these two factors seem directed solely at plaintiffs – should get a merit badge for reducing the number of claims or parties. Some lawsuits, even highly problematic lawsuits, by their very nature call for multiple claims and multiple parties.[124] The point of consequence is that there is no necessary connection between factors (b)[125] and (j) and either frivolousness or the infliction of undesirable costs on the parties or the court. That a case is a multiple party case or a multiple claim case hardly suggests that it is a frivolous case. As explained above, the mere filing of (multiple) frivolous claims imposes no significant costs where such claims are not pursued. What then is Section 4 of the Act saying to the court?

And what about factor (e): whether the outcome determinative issues of fact were reasonably in conflict.[126] What does that mean? We are generally familiar

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119. At the risk of repetition, I note – and reject – Section 4's mandate that the factors be considered "in determining *whether* to assess" sanctions. MISS. CODE ANN. § 11-55-7 (Supp. 1988) (emphasis added).

120. MISS. CODE ANN. § 11-55-7(a) (Supp. 1988).

121. MISS. CODE ANN. § 11-55-7(i) (Supp. 1988).

122. MISS. CODE ANN. § 11-55-7(b) (Supp. 1988).

123. MISS. CODE ANN. § 11-55-7(j) (Supp. 1988).

124. *See, e.g.*, Papasan v. Allain, 478 U.S. 265 (1986), and particularly Justice Powell's less than perceptive footnote 3 in his dissenting opinion, 478 U.S. at 298 n.3.

125. Factor (b) ends with "to dismiss claims that have been found [by whom?] not to be valid," but because that language is preceded by the disjunctive "or," the reading we give factor (b) fits its language.

126. MISS. CODE ANN. § 11-55-7(e) (Supp. 1988).

with the standards for passing on motions for directed verdict and for judgment notwithstanding the verdict.[127] Is this what is meant? Or does factor (e) incorporate the summary judgment[128] standard? Or some other?

There is a more serious problem. I trust all would agree that a Rule 11 motion should be denied when made against a party who survived a motion for directed verdict, and even a motion for summary judgment.[129] But, as explained above, I hardly think the converse is true. I see nothing in Mississippi's Rule 11 that mandates sanctions against parties whose claims are dismissed or defenses stricken via summary judgment. The wording of Section 4's factor (e) is an open invitation to just that end. Because that invitation conflicts with Rule 11, I would reject it.

How then do we add structure to "reasonable" and "appropriate" such that we may expect over time an optimal degree (a) of consistency in results from county to county and from day to day and (b) of service of the end of general deterrence? The answer is not easy. However problematic Section 4 of the Litigation Accountability Act may be, it represents a step in the right direction. A *three* or *four* part balancing test should be developed and promulgated. The factors should not merely be whatever comes to the draftsman's mind, but a series of objective considerations carefully tailored to promote the end of general deterrence.

B. A Better Four Part Balancing Test, or, Assessing Sanctions According to Purpose

We turn now to factors that properly should be considered by a trial court in determining what is an "appropriate" or "reasonable" monetary sanction in a case in which Rule 11 liability has been found. At once we (re)emphasize that the court is not limited to attorneys' fees and legal expenses. Sanctions may and often should exceed these. The court's inherent power to assess sanctions upon those who abuse the judicial process supplies whatever authority is needed over and above Rule 11 itself.

1. The Needs of General Deterrence

The dominant factor upon which the trial court should focus in fixing the amount of sanctions is vindication of Rule 11's policy of general deterrence. This focus is quite different from a Rule 11 liability determination. There the court applies and enforces a rule, albeit one quite open-textured. General deterrence informs interpretation but it can never authorize a liability finding that does not fit Rule 11's text. On the matter of sanctions our only texts are "reasona-

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127. Stubblefield v. Jesco, Inc., 464 So. 2d 47, 54-56 (Miss. 1984); Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 657 (Miss. 1975).

128. Brown v. Credit Center, Inc., 444 So. 2d 358, 362-65 (Miss. 1983); *see also* Fruchter v. Lynch Oil Co., 522 So. 2d 195, 198 (Miss. 1988).

129. *But see* Schwarzer, *supra* note 4, at 1019 & n.27.

ble" and "appropriate" and the unwritten text of the inherent power. We adopt a utilitarian mode of thought.

First, we need to remind ourselves of that which we wish to deter. That is the frivolous filing, not just the burdensome filing. Rule 11 is only incidentally a docket control rule. It is not a rule addressing the problem of increasing complexity, even prolixity, in litigation. Our concern is the social cost of the frivolous filing. We wish to hold that cost at an optimally efficient level. We are never going to eliminate entirely frivolous filings and their costs. This is implied in our frequent references to "optimal" or "minimal" levels of filings and costs. There is a reason beyond impossibility why we shouldn't even try. I refer to the risks of over-deterrence and excessive satellite litigation.

At whatever level – and with whatever frequency – sanctions are assessed, affected parties will receive stimuli to action. This phenomenon occurs whether we intend such messages or proceed unawares. We know from the federal experience that excessive sanctions will produce two results. Non-frivolous and marginally frivolous filings will be withheld, and parties will engage in time-consuming and expensive satellite litigation. Trial courts accordingly must proceed sensitive to the social costs we will experience from Rule 11 sanctions that are too heavy handed, for there comes a point, for example, where the costs of satellite litigation exceed that saved by deterring frivolous filings. Over time such a practice would be self-defeating.

Recent studies in tort law may instruct us. There we find a growing consensus that, generally speaking, "injurers will act optimally if liability equals actual losses."[130] The aggregate social cost of accidents will be held to their minimum efficient level when the injurers are made to pay to victims *full actual losses.*[131] By the time the court is ready to rule on the Rule 11 motion, the costs of the frivolous filing (and the satellite litigation) have been sunk. The court's goal in reallocating those costs should be future oriented. Thus only indirectly is Rule 11 a fee shifting rule.

These considerations lead me to suggest a general approach to arriving at the amount of a "reasonable" sanction. First, determine the amount of the private costs to the party against whom the frivolous filing has been made. This includes legal expenses, attorneys' fees and, as well, nonpecuniary losses. To that figure should be added the court's best estimate of its costs, computed in

130. S. SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 128 (1987); R. POSNER, *supra* note 44, at 176.

131. There is a second reason often offered in law and economics literature why damages should equal full actual losses. Torts are restructured as involuntary transactions, or contracts, if you will. To be labeled just, a transaction (voluntary or involuntary) must make at least one party to it better off than before (as that party defines for himself "better off") and no one worse off. Obviously, if the injured person is not given full compensation, he has been made "worse off" by the transaction – the outcome of which by definition we label unjust. This conclusion holds whether we employ the Pareto criteria for justice/efficiency or the Kaldor-Hicks approach. Study of these is highly recommended but well beyond our grasp today. *See* J. MURPHY & J. COLEMAN, THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 212-18 (1984); R. POSNER, *supra* note 44, at 11-15.

a cost accounting sense. Here I would include the judge's time, the time spent by any law clerk or research assistant, the time of other court personnel, and a charge for use of judicial services and facilities. Again the services of a good cost accountant seem called for.

But these two sums, when added together, do not yield the sanction. If optimal deterrence be our goal, the glitches in the system must be taken into account. Not every frivolous filing will generate a Rule 11 motion. These failures must be made up.[132] Assume, hypothetically, that Rule 11 sanctions are inflicted on half the frivolous filings made over a given period of time. The trial judge, finding Rule 11 liability, should initially set the sanction at double the sum of private and public costs. The equation may be otherwise put: private cost (PrC) plus public cost (PuC) equals sanction (S) multiplied by the probability (and adequacy) of its infliction (P).

PrC + PuC = S x P, where S is the unknown. If private cost is $1,000 and public cost is $500, and over time roughly half of the frivolous filings are in fact sanctioned adequately, the initial assessment of the sanction should be approximately $3,000.

$$\$1,000 + \$500 = S \times 2$$

Two points need be made. I offer no mathematical formula that the trial judge may employ with his pocket computer and generate a correct answer. Moreover, I have no illusion that our courts will ever have accurate data on the frequency of frivolous filings incurring adequate sanctions.[133] What I offer instead is a form of symbolic logic which, if employed, offers promise of adding a measure of rationality and uniformity to the sanctioning process.

Second, my formula is only a suggested first step – the first factor to be considered in arriving at the amount of the sanction (once the court has decided the sanction will be monetary in form). The hypothetical $3,000 sanction must be adjusted by reference to sensitive consideration of the three factors that follow.[134]

Before leaving the factor of general deterrence, we need to emphasize its status in the balancing process. Promotion of the policy of general deterrence is the most important of the four factors. It is the trump card. Greater weight should

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132. In addition, not all Rule 11 motions will yield optimal sanctions. These inadequacies must also be factored into the sanction equation.

133. There is room and need for much empirical research regarding Rule 11 and its use and effectiveness.

134. Even when modified by the factors discussed below, an appropriate sanction will at times exceed the full pecuniary loss experienced by the adverse party. Our goal is general deterrence and only incidentally compensation. This raises the important question whether the entire sanction should be paid the Rule 11 movant, for surely we do not want to provide excessive incentives to litigants and lawyers to file motions for sanctions. A Rule 11 victory should not be a windfall for the successful movant. In this light, the court assessing the sanctions should not only provide what part must be paid by the party and what by the attorney (and whether shifting is allowed). The court should further direct what part shall be paid to the Rule 11 movant and what part to the general fund of the State of Mississippi. Suffice it to say that the sum payable to the movant should never exceed his reasonable and necessary pecuniary loss incurred resisting the frivolous filing augmented only modestly (*e.g.*, ten percent) as incentive to pursue the matter.

be given to it than to the others. For what the game is all about is holding the social costs of frivolous filings to an optimally efficient level.

2. The Fee Arrangement

The difficulty inherent in our quest for optimal efficiency is exacerbated by the tensions of the other factors that ought to be considered, weighed and balanced in determining the quantum of a sanction. We begin with the fee arrangement. The deterrent capacity of the Rule 11 sanction may vary considerably with the lawyer's arrangement. Put another way, under some fee arrangements lawyers are able to pass sanctions on to their clients who frequently are innocent parties.

Consider the three common types of fee arrangements: the hourly rate, the fixed fee, and the contingency fee.[135] Lawyers who are billing at an hourly rate (plus expenses) will often have the opportunity to pass on to their clients all or part of any Rule 11 monetary sanction (if not in this case, in the next one). Moreover, the clients in such fee arrangements are generally of the (relatively) deep pocket variety and are better able to absorb any such passed-on sanction. On the other hand, the lawyer handling a particular litigation on a fixed fee basis has no such capacity (absent, of course, agreement with his client). The lawyer handling a case on a contingency fee basis will at best have his net income from the case reduced by the amount of the Rule 11 sanction and at worst suffer an unrecovered out-of-pocket loss. These realities before us, it is readily apparent that a Rule 11 sanction of, say $5,000, imposed upon a lawyer may well under-deter frivolous filings by hourly rate lawyers and overly-deter frivolous filings by fixed fee and particularly by contingency fee lawyers. The point becomes important when it is recognized that Rule 11 functions in the context of much legitimate lawyer activity. If the rule is administered so that it over-deters, that by definition means that certain categories of lawyers are refraining from legitimate activity on behalf of their clients. Conversely, to the extent that Rule 11 administration under-deters, the cost of frivolous filings is not held to maximum acceptable levels.

The trial judge faced with administration of Rule 11 and who seeks to achieve its deterrent purpose but who is sensitive to the realities of under-deterrence and over-deterrence depending upon fee arrangements has a dilemma. Surely the way out is not to read the liability standards of the rule in a different way depending upon the lawyer's fee arrangement. For reasons noted elsewhere, there is a strong imperative that we achieve a relative uniformity in definition of frivolous filing and in determining when Rule 11 has been violated from county to county and from case to case. On the other hand, the trial judge is necessarily vested with considerable discretion regarding the form and severity of the sanction imposed. Though the point is not free of doubt, I am of the

135. And what of the statutory fee plaintiffs? *See infra* Part VII(B)(3).

view that the type of fee arrangement and under-deterrence/over-deterrence problems should be factored into this discretionary calculation, and that the prima facie sanction suggested in subpart 2 above should be modified as the fee arrangement may suggest.

3. The Regime of Private Enforcement of Statutorily Created Rights, or Legislative Encouragement of Certain Types of Actions

The imposition of Rule 11 sanctions against plaintiffs in certain types of actions may well run counter to express legislative declarations encouraging private enforcement. We refer to those statutory schemes wherein the legislature has established standards of conduct for certain parties, generally business firms, and where a major part of the enforcement scheme is authorizing injured parties to recover attorneys' fees and legal expenses, thereby encouraging a regime of private enforcement. Such statutes exist at the state level.[136] Perhaps even more on point are the federally created rights enforceable in our state courts under a regime of concurrent jurisdiction wherein the Congress has decreed a scheme of private enforcement, a major provision of which is the authorization of recovery of attorneys' fees by successful plaintiffs as a means of encouraging certain types of litigation.[137] Sanctions imposed upon parties and lawyers bringing suits of this sort should be sensitively modified and generally reduced.

4. The Rule 11 Movant's Duty to Mitigate His Damages

This final factor has been mentioned above and should be self-explanatory. A party moving for Rule 11 sanctions has a duty to hold to a minimum the costs he experiences from his adversary's frivolous filing. That duty is no less real or enforceable than a litigant's duty to refrain from frivolous filings. This factor is to be considered in reduction of the quantum of sanctions.

C. Non-monetary Sanctions

What we have said above concentrates upon the monetary form of sanction. We justify such concentration because monetary sanctions are and will be most frequently inflicted and most controversial. The monetary sanction is the high-profile sanction. The inherent power places within the court's quiver many other

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136. *See, e.g.*, MISS. CODE ANN. § 11-31-2(3)(c) (Supp. 1987) (attorneys' fees recoverable against party who brings attachment in bad faith); MISS. CODE ANN. § 75-24-15(2) (Supp. 1987) (attorneys' fees recoverable against violator of consumer protection chapter); MISS. CODE ANN. § 75-71-717 (Supp. 1987) (attorneys' fees recoverable by party who purchased illegal or fraudulent security); MISS. CODE ANN. § 83-21-51 (1972) (attorneys' fees recoverable against foreign insurance company for bad faith).

137. *See, e.g.*, The Civil Rights Attorneys Fees Awards Act, 42 U.S.C. § 1988 (1982), enforced in Marx v. Truck Renting & Leasing Ass'n, 520 So. 2d 1333, 1345-47 (Miss. 1987); The Truth In Lending Act, Lewis v. Delta Loans, Inc., 300 So. 2d 142, 144-45 (Miss. 1974); The Fair Labor Standards Act, Mengel v. Ishee, 192 Miss. 366, 4 So. 2d 878 (1941). *See generally* Marx v. Truck Renting & Leasing Ass'n, 520 So. 2d 1333, 1347-52 (Miss. 1987) (Robertson, J., concurring).

arrows. Perhaps we have gotten the cart before the horse by concentrating on the monetary sanction arrow before deciding that is the one we should choose.

Having in mind the purpose of general deterrence and, as well, the other factors just discussed, the court ought to select the least punitive form of sanction. If a non-monetary sanction seems as likely to give off adequate deterrent incentives, it should be chosen over a monetary one. This should almost always be so where, as a practical matter, an "appropriate" monetary sanction would be ruinous to the lawyers. Mississippi has many lawyers, particularly solo practitioners, whose practice could not withstand a $15,000 sanction. This is not to suggest that such lawyers should merely get a slap on the wrist when they file and pursue frivolous points and inflict costs thereby; merely that the form of such sanctions should be chosen with some care.

The variety of forms of non-monetary sanctions is limited to those which are reasonable, which means that they are limited by the imagination and creativity of the trial court. Among those that come to mind, in no particular order, are:

(a) a private reprimand;
(b) a public reprimand;
(c) striking the frivolous filing and proceeding with the case as though it had never been filed;
(d) an order to attend continuing legal education courses (over and above that already mandated by order of the supreme court); or
(e) mandatory pro bono work.

Because in a very real sense a frivolous filing constitutes nothing less than professional misconduct, referral to the Complaints Committee of the Mississippi State Bar is always an alternative that may be employed in conjunction with other court-imposed sanctions, monetary or non-monetary.

VIII. Three Practice Problems

A. Sua Sponte Rulings

The question may be asked whether the court may act sua sponte to impose Rule 11 sanctions or whether it must wait for a Rule 11 motion from an aggrieved litigant. The language of the rule does not expressly address the point. Yet we regard it implicit in the language that the court may act on its own initiative. "If a pleading or motion . . . is signed with intent to defeat . . . , it may be stricken . . . ." "For wilful violation . . . an attorney may be subjected to . . . ." "If any party files a motion or pleading which . . . is frivolous . . . , the court may order . . . ." In each instance the rule's language identifies a triggering event as a prerequisite to authority to sanction. In each instance that triggering event is litigation conduct by a party and/or his attorney. At no point does the rule read "and upon motion of a party aggrieved" or language to like effect.

There is a further rationale for the sua sponte authority. The costs of frivolous

filings are inflicted upon the court as well as the opposing litigant. It makes sense that the court should have authority to protect itself, even though no litigant files a Rule 11 motion. We recognize that, as a practical matter, cases will be few and far between when courts will act without the Rule 11 violation having been brought to their attention by aggrieved parties. Still the authority is there.

B. Procedural Due Process

Of concern is the sort of hearing to which the Rule 11 defendant may of right be entitled. We think of the familiar shibboleth of reasonable advance notice and the opportunity to be heard. On the other hand we think of the satellite litigation problem. The last thing we want is to wind up spending more litigating Rule 11 claims than we gain through our regime of general deterrence. Yet the Rule 11 defendant's due process rights may not be sacrificed on the altar of efficiency.[138]

At the very least the Rule 11 defendant is entitled to reasonable advance notice that the court is considering sanctions. Often the Rule 11 motion will suffice. In the case of sua sponte sanctions much more is required. In any event it is difficult to imagine a case in which the trial court should impose sanctions without giving the Rule 11 defendant a reasonable opportunity to speak his mind. Assuming sanctions are otherwise appropriate, the court should seldom make its sanctions order the last paragraph of the order disposing of the pleading or motion. More appropriately, that last paragraph should direct the party or his attorney to show cause why sanctions should not be imposed. Beyond fairness to the Rule 11 defendant, such process may serve as an important reminder to the trial court that the sanctions standards are different – generally stricter – than the standards employed in ruling on the pleading or motion.

C. Findings and Conclusions in Support of Awards

There is a third practice problem. To what extent should the trial judge explain the basis of his ruling on a Rule 11 motion? In days past Mississippi trial judges simply "ruled." The theory was that the winner didn't care what the judge's reasoning was, that the loser wouldn't be convinced (or assuaged) no matter what the judge said, and, besides, the chances of appellate reversal were reduced.[139] We have progressed beyond such thinking. The virtue of trial court

138. Here we are concerned not only with rights secured by MISS. CONST. art. 3, § 14 (1890), this State's due process clause. Rule 11 defendants are protected as well by the due process clause of U.S. CONST. amend. XIV, § 1. Valuable federal discussions of the process federally due to Rule 11 defendants include Sanko S.S. Co., Ltd. v. Galin, 835 F.2d 51, 53 (2d Cir. 1987); Tom Growney Equip., Inc. v. Shelley Irrigation Dev., Inc., 834 F.2d 833, 835-36 (9th Cir. 1987); Donaldson v. Clark, 819 F.2d 1551, 1559-61 (11th Cir. 1987); INVST Fin. Group, Inc. v. Chem-Nuclear Sys., Inc., 815 F.2d 391, 405 (6th Cir. 1987). *See also* Vairo, *supra* note 59, at 222-23.

139. This notion relied in part upon the supreme court's practice of implying findings and conclusions consistent with the trial court's ruling. *See, e.g.*, Cotton v. McConnell, 435 So. 2d 683, 685 (Miss. 1983); Harris v. Bailey Ave. Park, 202 Miss. 776, 791, 32 So. 2d 689, 694 (1947).

findings and conclusions even on motions and interlocutory orders has become apparent to all. We require such in some contexts;[140] strongly suggest it in others.[141]

Here we give kudos to the Litigation Accountability Act of 1988. Section 4 directs that, when granting sanctions, "the court shall specifically set forth the reasons for such award."[142] I would add only that the court should give reasons as well when sanctions are denied – at least in the case of non-frivolous Rule 11 motions.

The reasons why the basis of Rule 11 rulings should be given by trial courts – and, as well, by the supreme court on appeal – should be stated, though they are familiar. Forcing a judge to articulate the reasons for his ruling necessarily forces him to think through the matter more carefully and, it is assumed, make better decisions. Findings and conclusions assure a congruence between declared rule and official action.[143] They make possible scrutiny of whether Rule 11 rulings are faithful to the fit of the rule and its purpose of optimal general deterrence. Findings and conclusions keep the trial judge honest. More important, findings and conclusions are indispensable to the end of consistent and uniform application from county to county and from day to day.

IX. CONCLUSION

I come to the end not of my subject but my discussion of it. I have tried to progress through the subject as it ought to be considered today in our state. I have employed modes of symbolic logic, digression and stream of consciousness where they seemed of value. My goal has not to provide correct answers but to provoke thought, which I regard as the sole source of good answers.

So I conclude as I began. In Mississippi, as elsewhere, frivolous filings are a problem, both real and perceived. I am acquainted with no reliable statistics regarding the level of frivolous filings in Mississippi's courts, but I am confident the problem does exist. More precisely, I am confident that Mississippi experiences a social cost attributable directly to the frivolous filing and that it is the responsibility of government to direct its energies toward that phenomenon. Authority to do this is vested in the judicial department of the government of this state. While we need all the help we can get from others, in the end the judicial authority should be neither shared nor abdicated.

As I approach Rule 11, and the idea of a Rule 11, I am less sure.

From what has been said it is quite apparent that all would benefit from a redrafted Rule 11. This task should initially be that of the Advisory Committee on Rules. I think it but common sense that the committee ought to begin with

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140. Peterson v. State, 518 So. 2d 632, 636 (Miss. 1987).
141. Gavin v. State, 473 So. 2d 952, 955 (Miss. 1985).
142. MISS. CODE ANN. § 11-55-7 (Supp. 1988).
143. *See* L. FULLER, THE MORALITY OF LAW 81-91 (rev. ed. 1969).

the present text of Rule 11 and consider, as well, incorporating ideas from the Litigation Accountability Act of 1988 and Federal Rule 11. As valid as is the court's inherent power to sanction parties and attorneys who abuse the judicial process, that power to the extent feasible should be expressed in a revised Rule 11. I would hope that the draftsman of the revised Rule 11 would accept general deterrence of frivolous filings as the dominant purpose of the rule. Beyond that, the form of the rule should consist exclusively of objective standards at the liability and sanctions levels, with the addition of enhanced sanctions for wilful or malicious violations.

Meanwhile, the courts of this state are obligated to interpret and enforce Rule 11 of the Mississippi Rules of Civil Procedure in the manner which best fits the language of that rule. On points where the language is open-textured and where the rule is less than clear – and there are many – the interpretative problem should be resolved on a basis that is consistent in principle with Rule 11's language, that enhances the ability of the rule to hold to an optimally efficient level the social cost of frivolous filings. I trust those so reading the rule will find within it my penchant for objective deterrent standards, augmented by punitive sanctions only for wilful or malicious conduct. Any gaps in the rule beyond that point, of course, may and ought to be filled by reference to the inherent power of the court to sanction those who abuse the judicial process to the extent and limits of that inherent power.

We must always keep in mind that the rule is designed to deter frivolous filings, and not any other type of filings however problematic they may be. Rule 11 is only incidentally a docket control or case management rule. Those filings subject to the sanction are those where the party or attorney has no hope of success. That standard should be applied with sensitivity, learning as much as we can from the twin towering infernos of the federal experience: inconsistent and incoherent results from court to court and from case to case, and an avalanche of satellite litigation.

The most important task ahead has hardly been mentioned. We have talked of frivolous filings and general deterrence and symbolic logic. We have dissected Rule 11 and offered interpretative techniques. As much as we need these, there is something we need more: empirical research. We need competent and sensitive empirical research to tell us the nature and extent of the problem of frivolous filings, and of the social costs incident thereto. We need empirical research now and in the years to come on the effectiveness and effects of Rule 11 and other remedies that might be suggested. We need to learn from the federal experience, not through war stories and anecdotes, but through reliable data. I suspect lawyers have been making frivolous filings for a long, long time. Like the poor, perhaps frivolous filers will always be with us. The social cost problem may be traced to sources other than frivolous filings – to increasing quantity and complexity of legitimate filings. I am not prepared to exclude the

possibility that our response to the frivolous filings problem should be to do nothing. For without a broad base of empirical research what have we but a blind guess that Rule 11 does more good than harm?